

Law Note

THE EPILEPSIES: THEIR EFFECT ON THE BIOLOGICAL FAMILY, THE STATE-DECREED FAMILY, AND CIVIL LIABILITY IN CALIFORNIA*

INTRODUCTION

Despite society's almost universal belief, epilepsy is not a single disease. The impression etched into our consciousness by use of the singular form is that only one disease exists and that it is characterized by one set of symptoms: violent, recurrent, convulsive¹ seizures acquired hereditarily.² By producing this prejudicial image, the singular form is inaccurate for understanding the disorder.³ As the phrase *The Epilepsies* suggests, the malady is a manifestation of multiple causes. Moreover, the conditions should not even be characterized as a disease.⁴ The epilepsies are a group of

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1. Interestingly, a 1974 Gallup poll question about respondents' knowledge of the existence of epilepsy was phrased so as to refer to the convulsive nature of the disorder. The question read as follows: "Have you ever heard or read about the disease called 'epilepsy' or convulsive seizures (fits)?" *Hearings on H.R. 13405 Before the Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 147 (1974).

2. Many people admit they do not know the cause of epilepsy. *Id.* at 156. Of those who have expressed an opinion over a 25-year span, a range of 12% to 19% said epilepsy was hereditary. The bulk of the remainder said the "cause" was a brain or nervous disorder but did not indicate how the disorder was acquired. *Id.* at 156.

3. The single form, *i.e.*, epilepsy, will serve a valuable use in a more limited and technical sense. The role is adequately stated in H. GASTAUT, *DICTIONARY OF EPILEPSY* 8 (1973): In reference to etiology or the site of the lesion, the term *epilepsy* should be used, but in common usage the word *epilepsies* is more accurate and preferable.

Unfortunately, proper grammatical construction often hampers use of the plural form. Consequently, in this paper the singular form will be used in instances where the plural term is medically correct, but the singular is grammatically preferable.

4. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 403 (2d ed. 1972).

A disease is characterized by a particular destructive process in an organ

neurological disorders.⁵ This fact has far-reaching import not only in the medical community where, as a consequence, diagnosis, treatment, and cure remain fleetingly elusive, but also in the public forum where community consciousness perceptibly influences most daily activities of epileptic individuals.

Medical discoveries have destroyed the myths: No single disease exists;⁶ not all seizures are convulsive;⁷ epileptic people are neither insane, incurable, nor degenerate;⁸ many children outgrow the onset of seizures;⁹ seizures are controllable,¹⁰ and thus, many epileptic people lead normal, productive lives. These facts, only recently uncovered, provide the framework for bridging the gap between medical knowledge and social-legal response.

THE NATURE AND HISTORY OF THE EPILEPSIES

Epilepsies are neurological disorders caused by uncontrolled electrical discharges in the brain.¹¹ Whenever these discharges occur, a person has a seizure.¹² When they strike, the patient becomes unconscious, unaware of his actions¹³ and loses control of bodily

or organism with a specific cause and characteristic symptom. Epileptic disorders are of many types, and although each type may manifest characteristic symptoms, there is no solid evidence that such symptoms are triggered by a particular destructive process. Some researchers, however, believe that certain forms of the epilepsies are disease entities; see note 26 *infra*.

5. See text accompanying note 11 *infra*.

6. See text accompanying note 16 *infra*.

7. See text accompanying note 15 *infra*.

8. See text accompanying note 64 *infra*.

9. See text accompanying note 36 *infra*.

10. See text accompanying note 74 *infra*.

11. J. SUTHERLAND, H. TAIT & M. EADIE, *THE EPILEPSIES, MODERN DIAGNOSIS AND TREATMENT* 1-2 (2d ed. 1974).

12. "The most remarkable clinical characteristic of epilepsy is the discontinuity of symptoms with widely varying intervals between attacks." R. SCHMIDT & B. WILDER, *EPILEPSY* 3 (1968) [hereinafter cited as SCHMIDT].

13. Loss or impairment of consciousness is the most constant and significant component of most types of epileptic seizures. . . . Many variations in the length and depth of unconsciousness may exist. At the one end of the scale is an impairment of flash-like brevity. . . . At the other end is a coma so profound that maximal sensory stimulations will not arouse the patient. W. LENNOX, *EPILEPSY AND RELATED DISORDERS* 44 (1960) [hereinafter cited as LENNOX].

Consciousness, however, is not lost in every seizure or in every type of seizure. "Retention of consciousness is the rule in Jacksonian autonomic, sensory, and hallucinatory seizures. . . ." LENNOX 44.

movements.¹⁴ Additionally, in certain instances he might be subject to convulsions.¹⁵ Although some seizures are quite dramatic and severe,¹⁶ others are so slight they often go unnoticed.¹⁷ By far the most visible and well-known epileptic seizure is the *gran mal*,¹⁸ documented by writers as far back as 400 B.C.:

The patient loses his speech, and chokes, and foam issues by the mouth, the teeth are fixed, the hands contracted, the eyes distorted, he becomes insensible, and in some cases the bowels are evacuated.¹⁹

Less severe types include *petit mal* seizures,²⁰ myoclonic and

14. See notes 18, 21, 22, 23 *infra*.

15. Convulsive seizures commonly accompany a *gran mal* seizure. See note 18 *infra*.

16. See note 18 *infra*.

17. See note 20 *infra*.

18. At the very start of the *gran mal* attack there may be an arrest of activity and a brief stare prior to muscular contractions. The sequence of motor events usually proceeds from tonic muscular stiffening to clonic jerks. The body stiffens in opisthotonus (head and heels are bent backwards and the body bowed forwards) and, if erect, the patient falls. The arms may be flexed or extended, usually the former, and the legs are extended.

With a severe and generalized tonic contraction at the onset, air is forcibly exhaled through closed vocal cords, giving the "epileptic cry" of peculiar and piercing quality. The bladder frequently empties either at this time or later after the motor seizure is over and the patient has entered the state of post-convulsive stupor. The stage of tonic muscle contraction gradually merges into one of clonus, with at first just a diffuse trembling, followed by symmetrical jerking and relaxation of the extremities. As the attack ends, clonus slows in frequency and then ceases abruptly. The entire process usually requires 2 minutes or less and seldom extends as long as five minutes. SCHMIDT 11.

19. HIPPOCRATES, *On the Sacred Disease*, in 10 GREAT BOOKS OF THE WESTERN WORLD 156 (1952) [hereinafter cited as HIPPOCRATES].

20. *Petit mal* is classified into three types of seizures:

1. Simple *petit mal* spells. This is the most commonly encountered type of *petit mal* and consists essentially of sudden, vacant staring into space with occasional "rolling of the eyes back into the head."
2. *Petit mal* spell with clonic movements. This spell consists of the staring episode of simple *petit mal* with concomitant minor clonic of the head and upper extremities.
3. *Petit mal* with automatisms. This seizure consists of staring episodes of simple *petit mal* spells with associated automatisms consisting usually of repetitious smacking of the lips, chewing and swallowing movements and, occasionally, mumbling speech. S. LIVINGSTON, *COMPREHENSIVE MANAGEMENT OF EPILEPSY IN INFANCY, CHILDHOOD, AND ADOLESCENCE* 56 (1972).

Another seizure similar to *petit mal* is the absence seizure:

Absences . . . are of short duration rarely lasting more than a few seconds. In these transient breaks in the continuity of consciousness the patient, usually a child, behaves in the following characteristic manner:

1. He abruptly ceases whatever he is doing—eating, playing or talking.

akinetetic seizures,²¹ Jacksonian seizures,²² and psychomotor seizures.²³ Any one of these can occur in conjunction with another.²⁴ Moreover, the fact that a patient has exhibited only one type of seizure does not preclude the occurrence of some other.²⁵

The seizure types are manifestations of an underlying condition.²⁶

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2. He may "stare" ahead or roll his eyes upwards.
 3. For some seconds he is non-responsive, neither speaking nor understanding the spoken word.
 4. Thereafter he continues with what he was doing before the attack and may not be aware of the episode. J. SUTHERLAND, H.

TAIT & M. EADIE, *supra* note 11, at 12.

Petit mal is distinguished from absences by its characteristic spike wave action. See also J. PENRY, ABSENCE SEIZURES 133-35 (NINDS Monograph No. 14, 1972).

21. Infantile myoclonic and akinetic are "lightning seizures" which affect either consciousness or muscle control and movement. They can occur from 5 to 300 times a day and are seldom controlled by medication. Seizures are sudden and last a short time. There can be sudden loss of consciousness or muscle jerking and the face may turn red, white, or blue in color for the duration of the seizure followed by loss of energy and interest in surroundings. Infants may suddenly roll into a ball and have "colic" stare. J. SUTHERLAND, H. TAIT & M. EADIE, *supra* note 11, at 20.

22. The Jacksonian (or Bravais-Jackson) focal motor seizure consists of motor movements which occur in an orderly sequence or march. The movements involved are usually phasic or clonic in nature, and the most common movement at outset is of the hand, followed by that of the face and leg. In an idealized seizure, seldom observed clinically, twitching might begin in the hand, spread to the arm and face and down the leg to the foot. Seizures beginning in the foot spread up the leg, down the arm and to the face. SCHMIDT 22.

23. Psychomotor epilepsy is characterized by inappropriate movements or bizarre behavior without the person realizing they are occurring. Examples include smacking the lips, sudden change in emotion to rage and anger, sudden walking in circles or (quickly and without awareness) taking off clothes, unbuttoning and rebuttoning clothes, rubbing arms, legs, hallucinating, and other altered states of consciousness. Elapsed time is usually 10-15 minutes. See V. JANOVICH, PSYCHOMOTOR EPILEPSY; A POLYDIMENSIONAL STUDY (1974).

24. Tyson, *Children Suffer Also, More Have Epilepsy than Multiple Sclerosis*, Atlanta Journal, reprinted in *Hearings on H.R. 13405*, *supra* note 1, at 123. Ms. Tyson describes the seizures of Scott Waterman, age 16. Scott, who did not have a seizure until he was 12, undergoes three or four different types of seizures and has as many as 30 to 40 seizures a month. *Id.*

25. "Half of the patients who have absence seizures will eventually have one or more grand mal seizures." J. PENRY, *supra* note 20, at 134.

26. Lennox is among those epileptomologists who hold that certain forms of the epilepsies—petit mal variants—have disease characteristics (see note 4 *supra*); however, he agrees the seizure per se is a symptom. LENNOX 52.

They are a consequence of a "conspiracy of causes"²⁷ including²⁸ genetic influence and transmission;²⁹ biochemical deficiencies; infectious disorders (such as encephalitis);³⁰ traumatic head injury; prenatal, perinatal, and postnatal brain damage; congenital abnormalities and use of drugs or alcohol.³¹ In addition, any one of these causes may give rise to one or more of the seizure types. Not surprisingly, the possible combinations of cause and effect created by multiple seizure types and multiple causes are an obstacle to diagnosis, treatment, control, and cure.

Everyone is potentially subject to an epileptic seizure.³² "Even when none of the . . . factors capable of producing epilepsy is known to be present every living brain can still be made sufficiently hyperexcitable to produce an epileptic seizure."³³ This has a frightening implication. A man or woman not genetically predisposed to an epileptic disorder may someday suffer from one.³⁴ For example, seizures may be triggered by a head injury resulting from an accident, or they may appear because a dormant biochemical deficiency is awakened.

Generally, however, the epilepsies strike during the first two decades of life.³⁵ Although many youngsters outgrow the onset of

27. Lennox coined this phrase in an attempt to counsel his colleagues to look beyond the diagnosing of initial symptoms or causes. LENNOX 785.

28. "A list of etiologies will always be incomplete because of the abundance of causes and the changing aspects of pathology and medicine." E. NIEDERMAYER, COMPENDIUM OF THE EPILEPSIES 33 (1974).

29. J. METRAKOS & K. METRAKOS, GENETIC FACTORS IN THE EPILEPSIES 97-102; N. MYRIANTHOPOULOS, MATERNAL FACTORS INFLUENCING RISK OF EPILEPSY 103-107; P. BRAY, INHERITANCE OF FOCAL AND PETIT MAL SEIZURES 109-12 (NINDS Monograph No. 14, 1972).

30. Fabing & Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect Medical Progress*, 50 NW. U.L. REV. 42, 44 (1955).

31. E. NIEDERMAYER, *supra* note 28. This volume is devoted to a comprehensive discussion of the etiologies of the epilepsies. See also R. BARROW & H. FABING, EPILEPSY AND THE LAW 15-18 (2d ed. 1966) [hereinafter cited as BARROW]; SCHMIDT 44-67.

32. E. NIEDERMAYER, *supra* note 28, at 33.

33. J. SUTHERLAND, H. TAIT & M. EADIE, *supra* note 11, at 3.

34. In the new-born, trauma associated with birth, anoxic episodes, infectious processes, inheritable disorders with primary alternations of brain metabolism are frequent causes of chronic recurrent seizures in early or late childhood. In the elderly, vascular or degenerative changes may result in focal or diffuse brain damage and epilepsy. Throughout life, central nervous system infections, vascular lesions, tumors and trauma can result in epilepsy. In some kinds of epilepsy, such as progressive myoclonic epilepsy, inheritance may be a factor. *Hearings on H.R. 13405, supra* note 1, at 91 (statement of Dr. Joe Wilder, Chief Neurological Services, V.A. Hospital, Gainesville, Fla.).

35. "It is estimated that approximately 667,000 elementary school chil-

seizures,³⁶ rarely do they outgrow their stigma. Those who never outgrow seizures forever carry a psychological as well as physical burden. Furthermore, the epilepsies have an impact beyond that suffered by the epileptic himself. There are an estimated 4,000,000 people in the United States today with a seizure problem.³⁷ The number of people affected by the epilepsies is four to five times that amount.³⁸

Of the physical traumas that strike the human species, seizures certainly must be the most frustrating to the individual. A person healthy in every sense of the word becomes inescapably unhealthy for a few minutes a day, a week, or a year. There is no place to hide: The seizure strikes anywhere and everywhere. Only occasionally, an aura³⁹ provides warning of the impending seizure, allowing the individual opportunity to suffer privately.⁴⁰ Perhaps most frustrating of all is that the individual does not know what happened during the seizure.⁴¹ The only inkling something has

dren and 300,000 secondary school children have seizure disorders." S. REP. No. 94-29, 94th Cong., 1st Sess. (1975), in 1 U.S. CODE & AD. NEWS 593 (1975). The greatest incidence of epilepsy is in children. *Hearings on H. R. 13405*, *supra* note 1, at 55 (statement of Dr. David D. Daley, President, International League Against Epilepsy).

36. J. PENRY, *supra* note 20, at 134; BARROW 24.

37. *Hearings on 13405*, *supra* note 1, at 36 (statement of Paul E. Funk, Executive Vice President, Epilepsy Foundation of America). "Current estimates are that 1 to 2 percent of all Americans are affected by epilepsy, making it a health problem of national concern." S. REP. No. 94-29 (94th Cong., 1st Sess.) (1975), in 1 U.S. CODE & AD. NEWS 593 (1975).

38. An estimated 4,000,000 Americans experience recurrent seizures. *Id.* Family members—fathers, mothers, husbands, wives, brothers, and sisters— increase greatly the number intimately affected by the disorder. In 1966, Barrow estimated the number directly affected by a person with seizure predisposition at 8,000,000. However, this estimate was predicated on an estimate of 2,000,000 epileptics. BARROW 5. On a world scale, the frequency and severity of the disorder and those affected by it are even greater than in the United States. GASTAUT, *supra* note 3, at 7.

39. Aura is a Latin word meaning *wind*. The term was first applied by Galen, a Roman physician who lived in the second century after Christ, and who spoke of this warning as a wind passing up the extremities. The aura may be but a few seconds in duration, or it may last for many minutes. Observers may note pallor, restlessness, anxiety, or muscle twitching during the aura. The patient usually describes it as a "sick feeling" in the abdomen, a "queer feeling," or "dizziness," or "numbness," or "fear." The most common aura is an abdominal sensation of nausea or bloating. BARROW 11. See also LENNOX 174-82.

40. Auras occur in more than half of all recurrent convulsions. BARROW 11.

41. See note 13 *supra*.

been amiss may be the presence of a physical injury.⁴² The epileptic individual lives in a twilight zone from which escape is uncertain.

As a disorder, the epilepsies were known throughout history.⁴³ Hammurabi recognized their existence in his law codes.⁴⁴ Plato did so in his *Laws*.⁴⁵ Hippocrates⁴⁶ devoted an entire essay to their nature.⁴⁷ They are described in the Bible.⁴⁸ And recently they have been discussed in congressional chambers.⁴⁹ Astonishingly, throughout 4,100 years of history, little has changed. Although we have learned more about the epilepsies during the last forty-five

42. If you are present during a seizure: (1) Try to prevent the person's falling or hitting against something that could cause injury. (2) Place a soft object, such as a handkerchief, between the teeth to prevent the person from biting his or her tongue. (Do not attempt to force it, and do not insert any hard object, such as a pencil, which could itself cause serious injury.) (3) Stay with the person until the seizure is over. (4) Afterward, allow the person to become reoriented and then, if the person is an adult, ask what—if anything—you can do. (5) If he or she is a child, notify the parents or physician. Schultz, *Four Million Americans Should Not Have to Lie About Their Health*, TODAY'S HEALTH, Sept. 1975, at 16.

43. SCHMIDT 2.

44. O. TEMKIN, *THE FALLING SICKNESS* 47 (2d ed. 1971) [hereinafter cited as TEMKIN].

45. PLATO, *LAWS* 454 (Penguin ed. 1970).

46. *Biographical Note*, HIPPOCRATES IX. The early Greek medical treatises, which were brought together by the Alexandrian scholars of the third century, are attributed to Hippocrates.

47. The essay is entitled *On the Sacred Disease*. HIPPOCRATES 154.

48. *Mark* 9:14-29 (King James). Temkin Describes the episode in *Mark*, indicating that the story furthered the notion that epileptic seizures were the work of the devil. TEMKIN 91.

49. *Hearings on H. R. 13405*, *supra* note 1. During the 94th Congress, legislation was passed authorizing the Secretary of HEW to establish a Commission for the Control of Epilepsy and its Consequences. The duty of the commission will be to:

1. make a comprehensive study of the medical and social management of the epilepsies in the United States;
2. investigate and make recommendations concerning the proper roles of Federal and State governments and national and local public and private agencies in research, prevention, identification, treatment, and rehabilitation of persons with epilepsy;
3. develop a comprehensive national plan for the control of epilepsy and its consequences based on the most thorough, complete, and accurate data and information available on the disorder; and
4. transmit to the President and the Committee on Labor and Public Welfare of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives, not later than one year after the date of enactment of the Act, a report detailing the findings and conclusions of the Commission, together with recommendations for legislation and appropriations, as it deems advisable.

S. REP. NO. 94-29, 94th Cong., 1st Sess. (1975), in 1 U.S. CODE CONG. & AD. NEWS 593-94 (1975).

years than in the combined centuries of the past,⁵⁰ we struggle with the identical problem essayed by Hippocrates: the adjustment of social response to medical fact.⁵¹

Society's growing awareness of the epilepsies' existence and its slowly changing attitude toward them are a distinctly recent phenomenon. In Hippocrates' day the predominant response to witnessing an attack or seizure was fear, shame, or pity.⁵² The Romans spit on the epileptic person to throw back the contagion.⁵³ A seizure was considered the work of either gods or demons.⁵⁴ In pre-Christian days the disorder became known as the "Sacred Disease," most probably because the populace believed that the individual was possessed by a higher power, and thus cure lay in the supernatural.⁵⁵ During the Middle Ages, a seizure was considered a demonic possession controlled by the moon.⁵⁶

Medical men have been more pragmatic. To them, the disorder was neither supernatural nor sacred. Hippocrates believed the "disease" to be hereditary⁵⁷ with its cause located in the brain.⁵⁸

50. BARROW 10. During the ten years since the publication of the Barrow and Fabing book, medical research into the epilepsies has continued with vigor.

51. The essay takes exception to the common notion of the time that epileptic seizures were caused by either gods or demons and sets forth the hypothesis that seizures are hereditary, caused by disorders in the brain. HIPPOCRATES 154.

52. LENNOX 40; TEMKIN 9.

53. TEMKIN 8.

54. *Id.* at 7; HIPPOCRATES 155. The following quotation exhibits the prevailing attitude of the ancients:

For if they imitate a goat, or grind their teeth, or if their right side be convulsed, they say that the mother of the gods is the cause. But if they speak in a sharper more intense tone, they resemble this state to a horse, and say that Poseidon is the cause. Or if any excrement be passed, which is often the case, owing to the violence of the disease, the appellation of Enodia is adhibited; or, if it be passed in smaller and denser masses, like birds, it is said to be from Apollo Namius. But if foam be emitted by the mouth, and the patient kick with his feet, Ares then gets the blame. But terrors which happen during the night, and fevers, and delirium, and jumpings out of bed, and frightful, and fleeing away, all these they hold to be the plots of Hecate *Id.*

55. TEMKIN 7.

56. *Id.* at 95-98, describing the effects of the moon and the influence of the devil.

57. HIPPOCRATES 155.

58. *Id.* at 156.

Galen⁵⁹ thought the "disease" originated either in the brain or in irritating sources brought to it from the body.⁶⁰ This attitudinal dichotomy persists today. To doctors, seizures are a medical symptom: To laypeople, seizures are a social dilemma.

Treatment of the disorder, from the Greeks to the Middle Ages, was a chaotic combination of the supernatural and the physical.⁶¹ Thousands of years before today's wonder drugs, medical practitioners experimented with a myriad of remedies commonly used for other maladies: bloodletting, hygiene and diet control, potions and herbs.⁶² The lay populace added sacrifices, gifts, prayer, and exorcism.⁶³ Ineffectiveness of both approaches apparently confirmed the already pervasive assessment that the epileptic person was incurable, degenerate, and insane. This belief resulted "in an attitude of defeatism among doctors and in social ostracism of the epileptic by the general public."⁶⁴

By the late 1800's, however, the underpinnings supporting the conclusion of impotency and helplessness in medical treatment were quietly being upset by the work of dedicated clinicians. Bravais,⁶⁵ Bright,⁶⁶ Jackson,⁶⁷ and Gowers⁶⁸ clarified the mechanisms and characteristics of epileptic disorders. Their work was given impetus by the discovery that potassium bromide to an extent controls seizures.⁶⁹ Introduction of the drug phenobarbital in 1912 provided

59. *Biographical Note to GALEN, On the Natural Faculties*, in 10 GREAT BOOKS OF THE WESTERN WORLD 163 (1952).

60. LENNOX 14-15.

61. *Id.* at 18-25.

62. *Id.*

63. *Id.*

64. *Id.* at 34.

65. Bravais initially studied and observed what has come to be described as "Jacksonian" epilepsy; i.e., those seizures which begin in one part of the body and travel to another. He made no attempt to explain his observations. TEMKIN 305.

66. Bright combined the clinical and the anatomical approach, reaching conclusions concerning changes that occur in the cortex of the cerebral hemispheres. *Id.* at 307.

67. Jackson is considered the premier clinician of his time. He documented four causes of unilateral convulsions:

- A. the seat of the internal lesion;
- B. the functional nature of the change in the muscle area affected;
- C. the pathological process which brought about the functional change; and
- D. the circumstances which determine the paroxysm. *Id.* at 328.

68. W. GOWERS, *EPILEPSY AND OTHER CHRONIC DISEASES: THEIR CAUSES, SYMPTOMS & TREATMENT* (1885). This work is considered a classic in its field. Although his comments on therapy are partially outmoded, his principles of patient care and management are still valid.

69. SCHMIDT 142.

a more effective method of seizure control.⁷⁰ Then in 1929, another breakthrough occurred. Hans Berger, a German researcher, invented the electroencephalograph, the so-called brain-wave machine,⁷¹ which permitted the first electrical recording of an epileptic discharge. It has since become an indispensable tool in diagnosis, treatment, and research,⁷² enabling medical understanding of the epilepsies to flourish. This increased clinical knowledge, coupled with further advances in drug therapy,⁷³ formed the foundation for a concept about the epilepsies far different from that which was in vogue one hundred years ago: The epilepsies are manageable!

Today, proper treatment with anti-convulsive drugs results in seizure control in eighty per cent of the known epileptic population.⁷⁴ The success of anti-convulsant drugs in controlling seizures has dramatically changed the lives of epileptic men and women. Most epileptic people are now capable of leading useful and normal lives. No longer are the physical miseries of the past a constant shackle. Freedom from seizures has created new horizons, simple, yet essential to the spirit. To work without anxiety or fear, to be self-sufficient and productive, to be a member of the mainstream of society are the once impossible goals now achievable as a result of medical advances.

CONTINUING THE ADJUSTMENT OF SOCIAL RESPONSE TO MEDICAL FACT

The Dilemma

Significant medical advancements in diagnosis and treatment of the epilepsies did not occur until early in this century.⁷⁵ Reflecting this latter-day wave of medical achievements, society only recently has endeavored to alter attitudes toward the epileptic individual.

70. *Id.*

71. BARROW 19.

72. *Id.* at 20.

73. For a brief introduction to drug therapy, see EPILEPSY SOCIETY OF SAN DIEGO, AN EPILEPSY MEDICATION HANDBOOK (1975). For an in-depth treatment of drug therapy, see M. EADIE & J. TYRER, ANTICONVULSANT THERAPY (1974); S. LIVINGSTON, DRUG THERAPY FOR EPILEPSY (1966).

74. Seizures are totally controlled in 50 per cent of all epileptics. Seizure frequency is reduced substantially in another 25 to 30 per cent of the epileptic population. BARROW 25; GASTAUT, *supra* note 3, at 7; SCHMIDT 142.

75. See text accompanying note 65 *supra*.

Dramatic social change came with publication in 1956 of *Epilepsy and the Law*, authored by Roscoe L. Barrow and Howard D. Fabing.⁷⁶ More than any other work, *Epilepsy and the Law* convincingly penetrated the shrouded myths encircling this enigmatic disorder and forced legislators throughout the country to reconsider and re-evaluate archaic laws governing the lives of epileptic people.⁷⁷ For example as late as 1955, eighteen states prohibited epileptics from marrying,⁷⁸ and nineteen states provided for their sterilization.⁷⁹ Today, no state restricts an epileptic's right to marry,⁸⁰ but six states continue to authorize eugenic sterilizations.⁸¹ However, although at the time legislatures responded quickly to Barrow's and Fabing's proposals, reform has not proceeded at a constant and expected pace. In many respects, the movement to establish and effectuate the rights of epileptic people has been stalled or side-tracked.

76. R. BARROW & H. FABING, *EPILEPSY AND THE LAW* (1956). Since the original publication, a second edition of *Epilepsy and the Law* has been published. All references in this article are to the second edition. See note 31 *supra*.

77. This searching re-examination prompted then Chief Justice Earl Warren to write: "*Epilepsy and the Law* probably caused more legislatures to amend more laws in a shorter period of time than any other similar research project of the past two decades." BARROW AND FABING, *Preface to BARROW IX*.

78. Fabing & Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect Medical Progress*, 50 NW. U.L. REV. 42, 46 (1955). By December 1964, this number had been reduced to four: Nebraska, North Carolina, Virginia, and West Virginia. The eugenic marriage statutes in these states have since been repealed.

79. *Id.* at 53. Generally as a requisite for application of the eugenic sterilization laws, it must appear that the epileptic would produce children with a tendency to epilepsy. Statutes specifying this criterion may also include other criteria based on therapeutic and social motives, such as whether the operation would be in the best interest of the patient and whether the children of the epileptic are likely to become a public charge. Frequently, criteria are expressed in broad terms, such as whether procreation by the epileptic would be harmful to society or against the public interest. *Id.*

For a recent compilation of present eugenic sterilization laws, see Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. FAM. L. 280 (1975). See also Murdock, *Sterilization of the Retarded: A Problem or a Solution*, 62 CALIF. L. REV. 917 (1974).

80. See note 78 *supra*.

81. DEL. CODE ANN. tit. 16, § 5701 (1953); IOWA CODE ANN. §§ 145.2, 145.9 (1972) (These sections provide for the sterilization of people who are mentally ill or retarded, syphilitic, habitually criminal, morally degenerate, or sexually perverted and who are a menace to society if procreation by such persons would produce a child having an inherited tendency to epilepsy); MISS. CODE ANN. § 6957 (1942); OKLA. STATS. ANN., tit. 43A, § 341 (1954); S.C. CODE OF LAWS tit. 32, § 671 (1962); UTAH CODE ANN. § 64-10-1 (1961).

In general, the phenomenon affecting epileptics is akin to that affecting our nation's soul-wrenching experience with desegregation. The rights recognized with the Supreme Court's decision in *Brown v. Board of Education*⁸² and its progeny⁸³ have become the conventional wisdom.⁸⁴ Tangible changes from a previously incorrect social-legal course were expressed in law.⁸⁵ These hard won rights, however, gave rise to new expectations—logical and reasonable corollaries of the initial rights. For instance, destruction of the "separate but equal" doctrine fulfilled a great expectation for Blacks. With its destruction rose a simultaneous belief that truly equal education for Black children, as well as for other children, lay in the near future. However, today, twenty-two years later, amid the bussing controversy, access to the right of equal education remains disputed.⁸⁶ The right itself is written in bold relief on the pages of our case law and statute books, but its effectuation in many quarters remains an unfulfilled hope at the crux of an exhausting battle.

A strikingly similar pattern emerges in the endeavor to bring about necessary change in the relationship between society and epi-

82. 347 U.S. 483 (1953).

83. *Brown v. Board of Education* held that the "separate but equal" doctrine was unconstitutional because it denied Black students of the equal protection of the laws guaranteed by the fourteenth amendment. The effect of *Brown* was to make illegal de jure desegregation. *Bolling v. Sharpe*, 347 U.S. 497 (1954), held that the due process clause of the fifth amendment prohibited racial discrimination in the public schools of the District of Columbia. Other cases upholding the *Brown* decision include *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1956) (action of Board of Directors of City Trusts, in refusing under terms of testamentary trust, to admit Blacks to school established by trust was state action amounting to unconstitutional racial discrimination); and *Cooper v. Aaron*, 358 U.S. 1 (1958) (right not to be discriminated against cannot be nullified by evasive schemes of state executive or legislative officers). For a list of some of the cases in this area, see 38 A.L.R.2d L.C.S. 1188 (1969).

84. "The unanimous decision of the court in the recent school cases thus represents the law of the land for today, tomorrow and, I am convinced, for the future—for all regions and for all people." At the time this statement was made Mr. Rogers was the Attorney General of the United States. Rogers, *Desegregation in the Schools: The Citizens Responsibility*, 45 CORNELL L.Q. 488, 490.

85. *Id.*; see note 83 *supra*.

86. *Brown v. Board of Education* made illegal de jure desegregation. The issue of de facto desegregation is another matter. For a comment on this issue and a compilation of recent cases, see 11 A.L.R.3d 780 (1967).

leptic men and women. Original expectations have been met. Anachronistic laws preventing marriage have perished.⁸⁷ Most laws condoning sterilization have been repealed.⁸⁸ Other laws have changed as well. All states provide some mechanism for allowing an epileptic to obtain a driver's license.⁸⁹ Worker's compensation laws now generally provide for "second injury funds"⁹⁰ which ostensibly foster the hiring of epileptics. But these changes have given rise to logical and reasonable corollaries that, as yet, remain unrealized. For example, changes in the worker's compensation laws have not avoided vexatious discrimination in hiring.⁹¹ Similar unnecessary discriminations are present in both driver licensing laws⁹² and adoption procedures.⁹³

This Note will analyze the extent to which societal reform continues in California as reflected by its laws, rules, and regulations. Discussion will highlight two basic components of society's structure: the family and civil liability.

The Family

The Epileptic's Right: Choosing to Marry and Raise Children

In California, an epileptic person's right to marry, have children, and raise a family has never been denied or restricted by legislative act, administrative regulation, or case rule.⁹⁴ Legislators and judges, acting with due restraint, avoided intrusions into inherently private conduct, recognizing forthrightly that the choice of a mate and the decision to have a child are matters beyond their legislative

87. See note 78 *supra*.

88. See note 81 *supra*.

89. BARROW 57-58.

90. BARROW 90-116.

91. Unemployment among epileptics is six times higher than the national average. S. REP. NO. 99-29, 94th Cong., 1st Sess. (1975), in 1 U.S. CODE CONG. & AD. NEWS 593 (1975).

California has attempted to overcome discriminatory practices in hiring with the passage of the Fair Employment Practices Act. CAL. LABOR CODE § 1410 *et seq.* (West 1971). The epileptic falls within the definition of the physically handicapped and is benefitted by this new legislation. CAL. LABOR CODE § 1413H (West Supp. 1975).

92. See note 231 *infra*.

93. See text accompanying notes 158-200 *infra*.

94. Other states in the recent past had eugenic marriage laws. See note 78 *supra*. Eugenic sterilization laws still exist in a minority of states. See note 81 *supra*. Neither eugenic marriage laws nor eugenic sterilization laws have been a part of California's legal heritage. CAL. PENAL CODE § 645 (West 1970) provides for the sterilization of certain sex offenders; however, it does not discriminate against epileptic persons. For an in-depth discussion of eugenic marriage and sterilization laws as they relate to the epileptic person, see BARROW 30-42.

and judicial cognizance.⁹⁵ This posture has been bolstered by the United States Supreme Court opinions in *Griswold v. Connecticut*,⁹⁶ *Roe v. Wade*,⁹⁷ and *Loving v. Virginia*.⁹⁸ Marriage, marital privacy, and biological parenthood are significant rights within the Constitution's protective mantle.⁹⁹

95. The status of California law on this issue reflects the sentiments expressed by Justice Goldberg in *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J., concurring):

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provisions of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

See also *Odell v. Lutz*, 78 Cal. App. 2d 104, 106, 177 P.2d 628, 629 (1947), quoting 39 AM. JUR. 597, 594 (1942). "So fundamental are the rights of parenthood that infringements thereof have been held to constitute an encroachment on the personal liberty of the parent forbidden by the Constitution."

96. 381 U.S. 479 (1964).

97. 410 U.S. 113 (1972).

98. 388 U.S. 1 (1966).

99. In *Griswold*, the Court indicated there were zones of privacy emanating from the specific guarantees of the Bill of Rights. It further indicated the marital relation to an undefined extent fell within such zones. Although it was the privacy of the husband-wife relationship which the Court spoke about, the case has ramifications for the parent-child relationship. As noted by Justice Goldberg:

The entire fabric of the Constitution and the purposes that already underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. 381 U.S. at 495-96 (concurring opinion).

In *Loving*, the Court struck down an anti-miscegenation statute as violative of the equal protection clause of the fourteenth amendment. As Chief Justice Warren said: "Marriage is one of 'the basic civil rights of man'; fundamental to our very existence and survival." 388 U.S. at 12. In addition, the Court as far back as 1942 indicated marriage was fundamental. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The Court has also indicated that parenthood is a significant right. In *Roe*, the Court held that state criminal abortion laws which except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests violate the due process clause of the fourteenth amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. The decision to terminate a pregnancy in its first trimester is

In all but exceptional cases, the state is powerless to deny people the right to procreate.¹⁰⁰ However, when the decision to have a child is made, both legislative and common law duties attach to the relationships formed.¹⁰¹ For example, when a child is abused or neglected by its parent, the state may intervene to sever or alter the parent-child relationship.¹⁰² Thus, the significant right to choose biological parenthood does not translate into an absolute right to raise the child.¹⁰³ Between these two rights exist a num-

made by the pregnant woman and her attending physician. During this period the state is powerless to intervene. 410 U.S. at 164. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that a biological parent cannot be denied the right of raising his child without a showing of the parent's unfitness. *Accord*, *Odell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947).

100. *Buck v. Bell*, 274 U.S. 200 (1927), held it is not a violation of the equal protection laws for state officials under a state statute to sterilize a feeble-minded person. *Bell* is still controlling precedent; see *In re Cavitt*, 182 Nev. 712, 157 N.W.2d 171 (1968). Thus, a category of people exists who are subject to deprivation of the right to choose procreation. In *Bell* the Court used the rational relation test. 274 U.S. at 207. In 1942, however, the standard of review was elevated to strict scrutiny. In *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Court said:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize . . . may have . . . devastating effects. . . . There is no redemption for the individual whom the law touches He is forever deprived of a basic liberty.

Griswold v. Connecticut, 381 U.S. 479 (1965), applied the same test to marital privacy; *Roe v. Wade*, 410 U.S. 113 (1973), applied the same test to a mother's right to obtain an abortion within the first trimester; and *Loving v. Virginia*, 388 U.S. 1 (1967), applied the same test to the right to marry. These recent cases clearly appear to undermine *Bell*. Furthermore courts are becoming increasingly strict in allowing sterilizations even of the mentally retarded. See *Wyatt v. Adderholt*, 368 F. Supp. 1382 (N.D. Ala. 1973); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971). See generally *Murdock, Sterilization of the Retarded: A Problem or A Solution*, 62 CALIF. L. REV. 917 (1974); Comment, *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. LAW, 280 (1975).

101. *Lewis v. Lewis*, 174 Cal. 336, 339, 163 P. 42, 44 (1917) (A parent's duty to support his minor child rests on fundamental natural law, and has always been recognized by the courts in the absence of any statutory provision.); *Fox v. Industrial Acc. Com.*, 194 Cal. 173, 228 P. 38. (parents are under a common law duty to support and educate their children); CAL. CIV. CODE § 203 (West 1954) (civil remedy for parental abuse of a child); CAL. PENAL CODE §§ 273a, 273d (West 1970) (criminal penalties for physical abuse of a child); CAL. PENAL CODE § 271a (West 1970) (criminal penalties for abandonment of a child). See generally 37 CAL. JUR. 2d *Parent and Child* § 19 (1957). As to the reciprocal duties owed by a husband and wife toward one another, see generally 26 CAL. JUR. 2d *Husband and Wife* §§ 17-53 (1956).

102. CAL. CIV. CODE §§ 193-215 (West 1954).

103. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court held a statute which declared an unwed father's child a state ward unconstitutional because it violated the equal protection clause and the due process

ber of legislatively created proceedings designed to establish a state-decreed parent-child relationship.¹⁰⁴ Among these proceedings are the child custody hearing and the adoption proceeding. Obviously, the paramount question facing epileptic people involved in such proceedings is how their disorder will affect the outcome.

The Epileptic and the State-Decreed Family

Custody hearings and adoption proceedings are legal procedures for deciding who should be assigned the opportunity and task of being a child's parent.¹⁰⁵ Although they differ in some aspects,¹⁰⁶ the goal of both proceedings is similar: to reconcile the competing and conflicting interests of the parties¹⁰⁷ in order to serve the "best

clause. This holding indicates biological parents have first right to raise their child. However, upon a showing of the parent's unfitness, the state may act to remove the child from the parent. *Id.* at 649. As to the termination of parental rights, see generally V. DeFRANCIS, *TERMINATION OF PARENTAL RIGHTS—BALANCING THE EQUITIES* (1971); H. SIMMONS, *PROTECTIVE SERVICES FOR CHILDREN* (1968); E. BROWNE, *CHILD NEGLECT AND DEPENDENCY: A DIGEST OF CASE LAW* (1973); W. SHERIDAN, *LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS* (Children's Bureau Pub. No. 472, 1969); T. BECKER, *DUE PROCESS AND CHILD PROTECTIVE PROCEEDINGS: STATE INTERVENTION IN FAMILY RELATIONS ON BEHALF OF NEGLECTED CHILDREN* (1971); Sutton, *Parents Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167 (1973).

104. The phrase "state decreed parent-child relationship" is used for two reasons: first, to distinguish custody hearings, adoption proceedings, and the like from the typical biological family; and, second, to designate those proceedings in which the court or an administrative agency creates or sanctions the new parent-child relationship.

105. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 5 (1973).

106. State-initiated custody proceedings fall into two broad categories, termination of parental rights and dependency or neglect proceedings. The difference between these two categories is primarily in the permanence and scope of the result. Termination involves the formal and permanent deprivation of all the traditional rights and duties of a parent, including those involved with custody, control, inheritance, and support. Termination usually arises in the context of adoption. CAL. CIV. CODE, § 224 (West 1954). Dependency and neglect, in contrast, are both considered temporary and generally affect only rights to custody and control of children, not all underlying legal rights. Nevertheless, an adjudication of dependency or neglect can result in taking the child from the parents' custody and placing him in an institution for children or in a foster home—a step which may have a lasting detrimental effect on the family. See note 103 *supra*.

107. Besides the state, the parties to a child placement hearing are the child, the present custodian, and the prospective custodian. As to the right of a child to be independently represented in any such hearing, see J. GOLD-

interests of the child."¹⁰⁸ Because significant changes have occurred recently in the adoption laws concerning epileptics, the subsequent analysis is set in the adoption context with comparisons made as needed to the custody proceeding. In addition, the adoption proceeding itself will be analyzed from two perspectives: the perspective of an epileptic child available for adoption and the perspective of an epileptic parent who desires to adopt.

The Epileptic Child

In California, the requisite tasks necessary to place a child effectively are performed by both public and private agencies.¹⁰⁹ Essentially, their charge is to find a family acceptable to agency standards and willing to serve the child's needs.¹¹⁰ Although it is harder to achieve, this goal is no less important for the epileptic child than for the "healthy" child. Except for the actual occurrence of a seizure, the epileptic child is healthy. More often than not seizures are controllable with proper medication. Nevertheless, under existing legislation the epileptic child is defined as handicapped.¹¹¹ Consequently, throughout this Note the words *epileptic* and *handicapped* are used interchangeably.

Not long ago agencies had to "sell the country on adoption."¹¹² Recruiting adoptive parents was necessary because society in general looked unfavorably on adoption and on the adoption process.¹¹³

STEIN, A. FREUD & A. SOLNIT, *supra* note 105, at 64. See Sutton, *supra* note 103, as to a parent's right to counsel in dependency and neglect proceedings.

108. Although the goal is "the best interests of the child," there is considerable controversy over what constitutes this interest. See generally Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145 (1966); *Children and the Law—A Symposium, Child Placement: Law and Theory*, 20 CATHOLIC LAW. 85 (1974); *Recent Trends in California Law Concerning the Best Interests of the Child*, 1 PEPPERDINE L. REV. 89 (1973).

Furthermore, there is controversy whether the concept of the child's best interest is itself a proper goal. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 105.

109. 22 CAL. ADM. CODE § 30517 *et seq.*

110. Katz, *supra* note 108, at 154.

111. CAL. HEALTH & SAFETY CODE § 250.5 (West 1970); 17 CAL. ADM. CODE § 2901 (1975).

112. Reid, *Principles, Values, and Assumptions Underlying Adoption Practice*, in SOCIAL WORK IN ADOPTION 1, 5 (1971); CALIFORNIA CENTER FOR HEALTH STATISTICS, TEN YEAR TRENDS IN THE ADOPTION PROGRAMS IN CALIFORNIA (Rep. No. 341-0472-501, 2 (1973)) (on file in the office of the *San Diego Law Review*).

113. "Attitudes toward illegitimacy, toward bringing children of different blood into the family set up strong barriers to adoption." Reid, *supra* note 112, at 5.

Consequently, many social workers believed adoptive parents were doing the child and the agency a favor by accepting a homeless child.¹¹⁴ This situation engendered the "Blue Ribbon Attitude" that agencies would provide only healthy, "perfect" children.¹¹⁵ Thus, a premise developed that was seriously detrimental to the handicapped child:

It was in the best interests of the child for him to be perfect and to match perfectly with a family. If the child was imperfect, if his physical defects or emotional difficulties would make it difficult for him to be accepted by the adoptive family, he was in a sense *unadoptable* and it was better for him to be raised in a form of foster care other than adoption.¹¹⁶

Because of the child's handicap, prospective parents shied away from accepting the added financial strain and emotional commitment which they perceived would accompany such adoptions.¹¹⁷ This attitude, which still prevails,¹¹⁸ stems from a deep-rooted societal prejudice against the ill and infirm.¹¹⁹

In the past, this predisposition, coupled with agency practices, often deprived the handicapped child of a home. For the epileptic child, the obstacles to an early, stable, and final placement were even greater than those for other handicapped children. An adoption could be vacated if the child gave indications of being feeble minded, epileptic, or insane as the result of pre-existing conditions of which the parents had no knowledge.¹²⁰ Thus, a child who mani-

114. Reid, *supra* note 112, at 5.

115. *Id.* at 6.

116. *Id.*

117. This point may be highlighted by the fact that the preference among prospective parents is to adopt healthy white infants. As Kadushin notes: "According to the Child Welfare League, in 1971 there were 133 approved adoptive homes available for every 100 white adoptive children, but only 71 approved homes for 100 non-white children." A. KADUSHIN, *CHILD WELFARE SERVICES* 528 (2d ed. 1974) [hereinafter cited as KADUSHIN].

118. *Id.*

119. The ill and infirm are treated differently in our society. For an in-depth analysis of the problem and the ways in which a handicapped person may cope, see B. WRIGHT, *PHYSICAL DISABILITY: A PSYCHOLOGICAL APPROACH* (1960). For a legal analysis of issues facing handicapped persons, see M. Burgdorf & R. Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975).

120. Cal. Stats., c. 531, p. 1523, § 1 (1947), as amended CAL. CIV. CODE § 227b (West Supp. 1975).

Arkansas, Iowa and Missouri still retain a statute which permits the vaca-

fested seizures after adoption could be returned to state custodial care. Such a child was destined to remain unadoptable although contemporary medicine could control epileptic seizures. Therefore, by legislative action, an adopted epileptic child could be legally constrained from leading a normal family life.

Our cultural preferences are such that society believes a child is best reared in a nuclear family.¹²¹ Accordingly, strenuous efforts have always been made to protect these relationships once they have been formed.¹²² Nevertheless, little has been done to cultivate these relationships for the handicapped, hard-to-place child. In recent years, however, agency philosophy has been modified to overcome this deficiency.¹²³ Furthermore, a shift in social attitude¹²⁴ fostered by aggressive legislative action¹²⁵ has abrogated the restrictive policies of the past. Adoption is no longer frowned upon by the public. In fact, it is seen as a highly satisfactory alternative to raising one's own children.¹²⁶ With this shift in attitude, there has been a commensurate rise in the number of adoptive applicants.¹²⁷ Simultaneously, the number of children available for adoption has been decreasing steadily.¹²⁸ The high applicant-to-child ratio has provided agencies with a reservoir of prospective

tion of an adoption where the child is discovered to be epileptic. ARK. STAT. ANN. § 56-110 (1971); IOWA CODE § 600.7 (Supp. 1976); MO. REV. STAT. § 453.130 (1952).

121. "One of the most important principles of child welfare, and one original to this field, is the significance to the child of having his own mother and father." D. HUTCHINSON, *CHERISH THE CHILD* 26 (1974). See also Katz, *supra* note 108, at 154.

122. See note 101 *supra*.

123. See text accompanying note 131 *infra*.

124. See text accompanying note 126 *infra*.

125. See text accompanying note 136 *infra*.

126. At the same time, the potential demand for adoption increased as the large numbers of children born in the late 1940's and early 1950's began reaching the age of adoptive application and concern with population increase led to growing acceptance of adoption by fertile couples who deliberately choose not to bear their own children. A poll conducted in 1971 by a Presidential Commission on Population Growth found that 56 percent of respondents indicated they would consider adopting a child if they already had two children and wanted a larger family. KADUSHIN 527.

127. *Id.*

128. The principal factor in the decrease of white, nonhandicapped children available for adoption is the greater availability of contraception and abortion, as a consequence of which the rise in illegitimate births has been slowed and, in some places, reversed. More significant, fewer unmarried mothers give up their babies for adoption, because more adequate social services enable more of them to keep and raise their children, while the stigma attached to unmarried motherhood is fading. Interestingly enough, the same factors are also reducing the number of children available for adoption abroad. *Id.*

parents.¹²⁹ This fact alone stimulates activity to place handicapped children.¹³⁰ Because agency philosophy has also changed, most children are considered adoptable.¹³¹

Notwithstanding these changes, a vestige of the social prejudice against adopting a handicapped child has endured. The preference among prospective parents is for a healthy, white infant.¹³² This

129. Changes in supply and demand are summarized in the ratio statistics: In 1958 there were 158 applicants for every 100 children available; in 1962, 129 applicants for every 100 children available; in 1967, 104 applicants; in 1970, 150 applicants; in 1971, 200 applicants for every 100 children available. *Id.*

130. Another factor stimulating the adoption of handicapped or hard-to-place children is the unavailability of healthy white children. As Kadushin notes: "Diminished availability of white, non-handicapped children increased the demand for, and placeability of, all 'children with special needs' and in 1970 'about three-fourths of the agencies report[ed] that they have put greater emphasis on adoption planning for nonwhite children.'" KADUSHIN 528.

131. The goal is the creation of a successful parent-child relationship between the adopted child and his new parent. To this end, active effort is made to place the handicapped. In *Department of Social Welfare v. Superior Court*, 1 Cal. 3d 1, 459 P.2d 897, 81 Cal. Rptr. 345 (1969), the court stated: "The main purpose of such statutes is the promotion of the welfare of children 'by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.'" *Id.* at 6, 459 P.2d at 899, 81 Cal. Rptr. at 347 (1969). See CAL. CIV. CODE § 221 *et seq.* (West Supp. 1975). Section 227 in intent is virtually the same now as it was in 1872. CAL. CIV. CODE § 227 (West 1954). It provides that the judge be satisfied that the interests of the child will be promoted by the adoption. Section 226 provides that the State Department of Social Welfare—in cases in which the natural parents consent to the adoption is needed—must ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child. In all cases where the consent of the natural parents is not required, the State Department of Social Welfare will file its consent with the court. "Such consent shall not be given . . . unless the child's welfare will be promoted by the adoption." CAL. CIV. CODE § 226.3 (West Supp. 1976). See generally Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. LAW 443 (1971).

At a minimum, the basic goals of the parent-child relationship include: maintaining an orderly, stable, and loyal relationship so that the government will not be required to intervene in that relationship; providing a financial base which will enable a child to mature into a healthy adult and to acquire the skills necessary to participate in and contribute to the economic processes of society; nurturing the child's physical and emotional safety, health, and comfort; providing a child with guidance and the opportunity for educational development; teaching a child respect for his parents, other authorities, and all human beings; and training a child in social responsibilities. Katz, *supra* note 108, at 168-69.

132. See note 117 *supra*.

preference is so strong that in many instances the waiting time from application until placement is approximately one year.¹³³ In effect, two distinct populations of adoptable children exist: the preferred infant and the less preferred older or handicapped child.¹³⁴ The handicapped child remains disadvantaged and often unadoptable.

Realizing¹³⁵ that state failure to remove the barriers confronting handicapped children seriously impeded placement, the California legislature recently enacted two laws.¹³⁶ The purpose of the programs created by these laws is to alleviate the financial and emotional stress created when the new parent-child relationship is formed.¹³⁷ The epileptic child is a beneficiary.¹³⁸ The Crippled Children Services Act¹³⁹ provides for grants to cover the cost of medical treatment and services if the child is diagnosed as handicapped when relinquished for adoption.¹⁴⁰ These grants are available regardless of the adopting parents' income, resources, or ability to pay.¹⁴¹ Also available is temporary financial help for parents who adopt hard-to-place children.¹⁴² Under the new Aid for the

133. C. Haughey & D. Holland, The Adoption Services Section of the San Diego Department of Public Welfare 11, Dec. 21, 1974 (unpublished paper on file in the office of the *San Diego Law Review*).

134. Actually, however, there are two different adoption supply-and-demand situations—one applies to the white non-handicapped child, another to the "child with special needs" or the "hard-to-place child"—the nonwhite child, the older child, the handicapped child. The largest group of hard-to-place children is composed of nonwhite children. According to the Child Welfare League, in 1971 there were 133 approved adoptive homes available for every 100 white adoptive children, but only 71 approved homes for 100 non-white children. KADUSHIN 528.

135. The Legislature's understanding of the problem faced by handicapped children is reflected in the Legislative Statement of Purpose:

It is the purpose of this chapter to encourage and promote the placement in adoptive homes of children who because of their ethnic background, race, color, language, physical or mental, or emotional or medical handicaps, or age or because they are a sibling group who should be placed in the same home have become difficult to place in adoptive homes.

It is the legislative intent to make available to prospective adoptive parents information concerning the availability of relinquished children, information and assistance in completing the adoption process, and the financial aid which might be required to enable them to adopt an otherwise hard-to-place child. CAL. WELF. & INST'NS CODE § 16117 (West 1972).

136. These are the Crippled Children Services Act, CAL. HEALTH & SAFETY CODE, § 270 (West 1970) and the Aid for the Adoption of Children Act, CAL. WELF. & INST'NS CODE §§ 16116, 16120 (West 1972).

137. See note 135 *supra*.

138. The epileptic child falls well within the definition of the handicapped child contained in each of these laws. See note 111 *supra*.

139. CAL. HEALTH & SAFETY CODE, § 270 (West 1970).

140. *Id.*

141. *Id.*

142. CAL. WELF. & INST'NS CODE, § 16120 (West 1972).

Adoption of Children Act,¹⁴³ the adopting parents receive funds that would otherwise be paid for foster parent care of the child.¹⁴⁴ This assistance is available for up to three years.¹⁴⁵

These innovative¹⁴⁶ programs do more than encourage the adoption of epileptic children. They foster early placement of such children, promoting a secure parent-child relationship. Each program demonstrates that a small investment of funds on a temporary basis can make it possible for many children to find a family of their own, with all the security and value that family life brings. From January 1, 1969, to December 31, 1970, a total of 1,267 children were placed in adoptive homes as a result of the Aid for Adoption program; 182 children were placed as a result of the Crippled Children Services Act. All these children had one or more characteristics which qualified them for consideration under the program. Past experience of adoption agencies, both public and private, substantiate that essentially all these children would have remained in long-term foster care unless given assistance by these legislative acts.¹⁴⁷ Additionally, results of the programs are solid evidence supporting the thesis that adoptive families are able to accept as their own children who are physically or mentally handicapped. The programs also educate the public about the reality faced by children living with epilepsy, thereby reducing individual and societal prejudices. Finally, they serve as successful examples to other states and countries¹⁴⁸ that a mechanism does exist to enhance the possibility that an epileptic child's needs can be met. Realistically, neither the state nor society can guarantee a family to a homeless, handicapped child. They can, however, make the child placement process as conducive to achieving that objective as California has attempted.

The biggest boon to the homeless epileptic child, however, is the recent legislative action deleting epilepsy as a basis for vacating

143. *Id.* §§ 16116, 16120 (West 1972).

144. *Id.*

145. *Id.*

146. These programs were among the first of their kind in the country. Other states and countries have requested information about the programs. DEPARTMENT OF SOCIAL WELFARE, THIRD ANNUAL REPORT TO THE LEGISLATURE ON THE AID FOR THE ADOPTION OF CHILDREN PROGRAM (1971) (on file in the office of the *San Diego Law Review*).

147. *Id.* at 2.

148. *Id.* at 1.

an adoption.¹⁴⁹ This amendment has particular significance for the adoptable infant. Epilepsy does not always manifest itself soon after birth. Typically, seizures may occur when the child is a toddler or a pre-schooler. Today, parents who discover their adopted child is subject to seizures cannot vacate the adoption.¹⁵⁰ By adopting, they succeeded to all the rights and duties within the ambit of biological parents.¹⁵¹ Responsibility for the child's physical and emotional well-being cannot be lessened by the child's subsequent physical infirmity. At no time in the past could adopting parents vacate an adoption for other potentially catastrophic physical illnesses such as polio, heart disease, or diabetes. Only the physical disorder, epilepsy, was singled out for this treatment. The sole rationale for such a classification was the mistaken belief that epilepsy is a form of insanity, or even something much worse.¹⁵² Medical facts have proved the falsity of this presumption. In its impact upon the family, the epilepsies are no different from other ailments. In fact, the probability the child may outgrow his epilepsy, or, at least, effectively control it, holds for the entire family the very real possibility the child's life will be full and reasonably normal. Furthermore, by reinforcing the parents' duties, the family setting is preserved, and the child reaps the benefit.¹⁵³

149. CAL. CIV. CODE § 227b (West Supp. 1975). In 1972, the legislature eliminated the word *epileptic* from the provision, rewriting it to read that an adoption could be vacated only if the child shows evidence of *mental deficiency* or *mental illness*, to such an extent that the child is considered *unadoptable*.

The effect of this change is to eliminate epilepsy in the child as a basis for vacating adoption. Also, the vacation of an adoption for reasons of mental deficiency or mental illness must meet the new statutory standard of unadoptability. To date there have been no cases interpreting this new statute. But in the recent past the courts have demonstrated their willingness to vacate an adoption. See, e.g., *Department of Social Welfare v. Superior Court*, 1 Cal. 3d 1, 6, 459 P.2d 897, 900, 81 Cal. Rptr. 345, 348 (1969). Also there are no legislative hearings documenting the legislature's intent or defining the terms *mental deficiency*, *mental illness*, or *unadoptable*. ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA LEGISLATURE, HEARINGS AND REPORTS OF COMMITTEES OF THE CALIFORNIA LEGISLATURE DURING 1972: A SUMMARY AND LISTING 53 (Nov. 1973). See also text accompanying note 120 *supra*.

150. CAL. CIV. CODE § 227b (West Supp. 1975). See also note 149 *supra*.

151. *O'Dell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947); CAL. CIV. CODE § 228 (West 1954).

152. See text accompanying note 189 *infra*.

153. The parents are not without assistance upon discovering their child has epilepsy. Under the Crippled Children Services Act they have free diagnostic services at their disposal as well as financial assistance for the treatment of their child if they cannot finance all or part of the child's treatment. CAL. HEALTH & SAFETY CODE, §§ 249, 250, 253.5, 255 (West 1970); 17 CAL. ADM. CODE § 2903 (1967), § 2904 (1967). The parents may also call

With the abolition of the adoption vacation statute, the child is protected from a potentially damaging disruption of the parent-child relationship. Nevertheless, one argument advanced against such legislative action is that forcing parents to keep a child they do not want will be just as damaging to the child as the potential disruption. Another argument is that the epileptic child had been benefitted by the vacation statute because it could be freed from the resentment of its parent and, now, this route to freedom is closed. To these arguments there are a number of responses: The resentment a parent may feel toward the child is in itself misplaced. It stems from a misunderstanding of epilepsy and the stigma attached to it. Notwithstanding this however, the parent may still harbor a damaging attitude. When the attitude is severe or extreme and results in abuse or neglect of the child, the state can act to remove it from the parent.¹⁵⁴ When the attitude is not so severe as to warrant state action, the child may be unloved. Thus, the issue is whether running the risk that an epileptic child will be unloved is a worthwhile price to pay for legislative action designed to protect the child's access to a home and family. Although the resolution of this issue is necessarily colored by one's own value preferences, what evidence there is indicates the risk is a worthwhile one to take.¹⁵⁵ The Aid to Crippled Children Act and the Aid for the Adoption of Children Act are evidence for the proposition adoptive parents are able to accept such children as their own.¹⁵⁶ Moreover, the parent is not without significant administrative and medical resources to deal with the child's epilepsy.¹⁵⁷ Finally, a child's early life is a risk whether raised by biological parents or by adoptive parents. The attitude toward the epileptic child from either kind of parent cannot be predicted. Thus, striking the balance so as to protect the child's access to a family is clearly the reasonable choice.

Absent legislation of this type, a child who had known only one set of parents could lose those parents and suffer an unnecessary, potentially damaging separation. Unreasonable discrimination

upon the resources of the Epilepsy Foundation of America and its local chapters. *Hearings on H.R. 13405, supra* note 1, at 37.

154. *See* note 103 *supra*.

155. *See* text accompanying note 147 *supra*.

156. *Id.*

157. *See* note 153 *supra*.

based upon the existence of a physical defect was unwittingly fostered, if not condoned. Clearly, the legislature's action did not withdraw a protection or prerogative from the parent; rather, it restored to the infant epileptic its right to a family by eliminating an anachronistic, unjustifiably discriminatory statute. No longer will the epileptic child be treated differently from other children with physical disorders.

Efforts to bring an epileptic person into full citizenship begin only with passage of progressive child placement laws; they cannot end there. As epileptic children grow older, they face handicaps beyond those that burden their bodies. Exploration and discussion of such problems begin in the subsequent section on the epileptic parents' ability to retain custody of their own child or to adopt a child.

The Epileptic Parent

In spite of efforts to provide for adoption of epileptics,¹⁵⁸ no equivalent effort exists to facilitate adoptions by epileptics. For childless, seizure-controlled epileptics pursuing vigorous lives, the situation is distressing. Set apart by epilepsy, these people may ultimately be prevented from adopting although they exhibit what otherwise would be admirable qualities in adopting parents.

Everyone desiring to adopt a child undergoes a background investigation.¹⁵⁹ This inquiry compiles data for evaluation of the applicant,¹⁶⁰ and, along with the pre-adoptive interview,¹⁶¹ allows the agency to decide the applicant's suitability as a prospective parent.¹⁶² An essential element of the investigation is the status of

158. See text accompanying note 135 *supra*.

159. 22 CAL. ADM. CODE §§ 30637, 30689 (1972).

160. *Id.*

161. *Id.* § 30633.

162. *Id.* § 30643.

What life in a home is like under the surface is of the greatest importance to a child since his future happiness and attitudes are largely determined by his early experiences. Therefore, in evaluating the prospective adoptive family, the agency needs to know whether the adoptive parents are mature adults capable of easy and loving relationships, secure enough in their marriage to share their love with a child of other parents, to face life's difficulties courageously, and to take the risks involved in adoptive parenthood willingly.

The purpose of the adoptive home study is not just to evaluate the applicants and their potentialities for growth and parenthood, but also to help prepare them for what is coming and the inevitable changes which will occur when a child enters the family. Sometimes adoptive applicants have not thought through what it will mean to them to share their life with a child. Smith, *Adoptive Services as Related to Adoptive Families: Introduction*, in READINGS IN ADOPTION 258, 261-62 (1963). See generally KADUSHIN.

the applicant's health.¹⁶³ In order to obtain the applicant's medical records, the agency requires a signed medical release.¹⁶⁴ Unless the applicant makes a concerted effort to conceal his epilepsy, the agency will quickly be made aware of its existence and the extent to which it is controlled.¹⁶⁵

Agencies must select couples who appear to have the ingredients necessary for a good relationship with the child not only as an infant, but also as it grows older.¹⁶⁶ These ingredients range from such definitive and objective standards as age, health, marital status, and religion to the ambiguous and subjective measurement of emotional health, capacity for parenthood, motive for adoption, and the quality of the marital relationship.¹⁶⁷ Each ingredient,

163. 22 CAL. ADM. CODE §§ 30637, 30689 (1972). For the purpose and rationale of the health requirement, see text accompanying notes 174-76 *infra*.

164. 22 CAL. ADM. CODE §§ 30635, 30705 (1972).

165. It is probably in the adopting couple's best interest to tell the case worker of the existence of the epilepsies. If the fact is hidden then subsequently discovered, the case worker will wonder about the couple's failure to speak and may come to the conclusion that the existence of the epilepsies creates other problems beyond the physical disability. As Isaac has noted: "In regard to any fact which a couple feel might be held against them, the best defense is offense. The couple should bring it up promptly of their own accord, adding 'We hope this won't be held against us.' They can then concentrate on showing how well they have handled the experience or met the skeleton." R. ISAAC, *ADOPTING A CHILD TODAY* 7 (1965).

166. D. FANSHEL, *QUANTITATIVE APPROACHES TO PARENT SELECTION* (1962), cited in Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 38 *SOCIAL SERVICE REV.* 26 (1964).

167. 22 CAL. ADM. CODE § 30643 (1972); KADUSHIN 528. Kadushin provides adequate explanations of each of the subjective and ambiguous criteria.

A. Emotional Health:

Emotional health as stated in the adoption literature, implies, among other things, a clear understanding of oneself, a relaxed acceptance of all one's weaknesses and strengths, a minimum of unresolved developmental conflicts, adequate enactment of principal social roles, an ability to postpone gratification and to deny self-gratification out of consideration for the needs of others, a flexible conscience that can accept some failure, some occasional sinfulness without crippling guilt, a capacity to form satisfying and permanent interpersonal relationships, the ability to be independent and yet be capable of dependency if it is objectively justified. It is said that in order to be a happy parent one must first be a happy person.

B. Capacity for Parenthood:

This factor is tied to the factor of emotional health, because the emotionally healthy person supposedly possesses the essential prerequisites for competent parenthood. Yet capacity for parenthood

when tested against agency standards, results in an evaluation of whether the applicant evinces those attributes perceived as necessary to properly perform as adoptive parents. Successful applicants must demonstrate emotional and physical stability, economic security, and an abundant capacity for parenthood.¹⁶⁸

Presently in California, the applicant-to-child ratio is extremely high.¹⁶⁹ Consequently the selective criteria for eligibility are be-

goes beyond emotional health—it includes the capacity to love, accept, and offer emotional security to children; the capacity to permit them to grow in terms of their own individuality; a readiness to accept, understand, and meet the inevitable behavioral problems of children. The good parent is flexible in his expectations and is realistic in accepting the child's limitations; he accepts the child as an end in himself rather than as a means toward some parent-defined end; he likes children and enjoys them.

C. Quality of the Marital Relationship:

Although the length of time married says something about the quality of the marriage, more than this needs to be assessed. Because the child is likely to be affected by the dynamics of marital interaction, the agency would like to assess the degree of mutual emotional satisfaction the applicants derive from their marriage. Factors such as mutual participation in decision making (particularly with reference to the decision to adopt), the extent to which each of the partners comfortably accepts his sexual identification, the degree of mutual sexual satisfaction, the acceptance of allocated roles within the family—all are regarded as important considerations. A happy family starts with a happy marriage.

D. Motives for Adoption:

The agency is also interested in the motives that have prompted the applicant to apply for adoption. Some motives are regarded by the agency as less desirable and more indicative of possible future difficulty. In general, motives that focus on the needs of the adoptive parents are regarded as less acceptable, more suspect, than those that center on the needs of the child. However, the same expressed motive can have a positive meaning as viewed in terms of another couple's situation. A desire to help a child grow may have positive connotations as expressed by an accepting, understanding couple; but in the case of a rigid, self-centered couple, it may indicate a desire to push the child to fulfill the prospective parents' needs and ambitions. *Id.* at 531-33.

168. See Maas, *The Successful Adoptive Parent Applicant*, 5 *SOCIAL WORK* 14 (1960). Maas conducted a survey of adoptive agencies in nine communities. His composite portrait of Jane and Harry Smith represents the characteristics usually present in a successful adoptive applicant. *Id.* at 16.

169. See text accompanying note 129 *supra*. From the 1963-64 fiscal year to the 1972-73 fiscal year there was a 43 percent decline in the number of children relinquished for adoption. The number of independent adoptions has decreased 56 percent. CALIFORNIA CENTER FOR HEALTH STATISTICS, *TEN YEAR TRENDS IN THE ADOPTION PROGRAMS IN CALIFORNIA* REP. NO. 341-0472-501, 1 (1973) (on file in the office of the *San Diego Law Review*).

Factors which may have contributed to the dramatic decline in relinquishment and independent adoptions are thought to be recent social change such as more effective and more widespread use of birth control methods such as the pill, the legalization of abortion in the State, and less social pressure and the increased desire and ability of unmarried parents to keep their children. *Id.*

At the same time, the potential demand for adoption has increased as the large numbers of children born in the late 1940's and early 1950's began reaching the age of adoptive application and concern

coming more stringent.¹⁷⁰ Agency discretion within the select group of eligible parents is growing.¹⁷¹ Case workers¹⁷² have at their disposal a greater variety of requirements to be met. For

with population increase lead to growing acceptance of adoption by fertile couples who deliberately choose not to bear their own children. KADUSHIN 527.

170. Probably, the most significant factor determining agency practice and procedure is the law of supply and demand. When the ratio of adoptive applicants to available children is low, the agency tends to modify or eliminate various eligibility requirements. KADUSHIN 526.

The agency will maintain ideal standards as long as the supply of fully qualified applicants who are ready to become adoptive parents exceeds the supply of children. When the number of children exceeds the number of fully qualified applicants, the agency will lower its qualifications for adoptive parents. Just as there is a limit beyond which the applicant prefers to withdraw his application rather than to lower his preference any further, so too there is a limit beyond which the agency is reluctant to lower its standards in order to accept progressively less qualified applicants.

Kadushin, *A Study of Adoptive Parents of Hard-to-Place Children*, 43 SOCIAL CASEWORK 227 (1962). Modification of standards will be made initially in qualifications having little or no functional importance for an effective performance as an adoptive parent. For example,

religion in this sense is a non-functional qualification for parenthood. One can effectively discharge the functions of parenthood as either a Protestant or an agnostic. Emotional stability, however, is a functional qualification. Hence, the adoption agency is likely to be more willing to accept a couple with different religious backgrounds than it is to accept an emotionally unstable couple. *Id.* at 231.

When the ratio is high, the agency can be extremely selective in choosing who will become a parent to a child. Criteria for acceptable applicants become more stringent, and agency discretion in placement increases proportionately. Thus, during periods when the applicant-to-child ratio is high, both the selectivity criteria and the power of the agency to place children within the select group increase.

171. *Id.*

172. Case workers, more out of necessity than lack of qualified applicants, are forced to reject many who wish to adopt. In theory, their decision is based upon objective standards applied with professional skill. Michales, *Casework Considerations in Rejecting the Adoption Application*, in READINGS IN ADOPTION 307-08 (1963). In reality, however, it is extremely difficult to excise personal values from the decision-making process. Reid, *supra* note 112, at 6. Case workers are human. They have their own prejudices and values. Consequently, their attitude about an acceptable adoptive prospect tends to solidify. D. HUTCHINSON, *CHERISH THE CHILD* 82 (1972). The resultant loss of flexibility eliminates from consideration those whose life-styles, demeanor, personality or health status are contra to the caseworker's ideal. Examples of this rigid use of criteria are highlighted in the writings of a noted commentator:

I knew one homefinder who could never approve a home where there was a dog; one who could not accept foster parents who slept in twin beds; another who did not like double beds; some who always ruled out people over a certain age; others who frowned upon divorcees and widows. *Id.* at 120.

example, discovery of a potential health problem in an applicant might serve as a safe shield from behind which a case worker could eliminate the applicant from consideration, even when the health problem is dormant, or, as in the case of the epileptic, controlled. This practice may well transform epilepsy into a barrier to eligibility,¹⁷³ compounding further the stigma already attached to the epileptic's every sojourn into society's mainstream. In competition with others not subject to seizures, the epileptic has been virtually priced out of the market.

Agencies require assurances of good health principally to insure the child against loss of another set of parents.¹⁷⁴ Not surprisingly, controlled seizures are consistent with this objective. Because epileptics' life expectancy is not greatly different from the norm,¹⁷⁵ chances of their living with and providing for the child are equal to those of "healthy" parents.

Another rationale for the good health requirement is the protection of the child's economic well-being.¹⁷⁶ This is a valid concern. Obviously, the parent is obligated to provide adequate clothing, shelter, food, and educational opportunities for the child. These obligations can be met by epileptic people, for they are fully capable of working and earning a good wage.¹⁷⁷ Also, the chance epileptics will be disabled on their job is no greater than that of others because epileptics perform their tasks as safely as the average worker.¹⁷⁸ Due to unreasonable discrimination which plagues the

173. The practice of denying epileptics the privilege to adopt exists. Recently, an epileptic mother wrote about her experiences in attempting adoption:

This doctor not only treated my disease, but also my ability to cope with other people's reactions. I began to see myself as a person with many good qualities as well as some not so good, and to view epilepsy as a minor rather than the supreme part of my life.

Unfortunately, the adoption agencies didn't seem to agree. In spite of their telling Con and me that we had "all the right qualifications," we were turned down by every agency we applied to.

O'Donovan, *A Young Mother's Story*, REDBOOK, Apr. 15, 1976, at 48.

174. "The physical and mental health of the adoptive applicants is important to ensure a child parents with reasonable life expectancy, the ability to care for him, and the security of having parents until he reaches maturity." Smith, *Adoptive Services as Related to Adoptive Families: Introduction*, in READINGS IN ADOPTION 258, 262 (1963). See also KADUSHIN 530.

175. BARROW 21; *Hearings on H.R. 13405*, *supra* note 1, at 55 (statement of Dr. David D. Daley, President, International League against Epilepsy).

176. KADUSHIN 530.

177. See *Birdsall v. United States*, 4 F. Supp. 140 (D. Colo. 1933) (The court took judicial notice of the fact that many men in various walks of life, with epilepsy, are earning a living.).

178. BARROW 70.

epileptic, there is, among epileptics, a greater percentage of unemployed than in the general population.¹⁷⁹ This fact is of little consequence, however, if the applicant is working and meets the agency's economic requirements. Besides, one form of discrimination ought not perpetuate another.

The physical manifestation of the disorder is no barrier to providing for the child's everyday needs. It is doubtful a seizure would occur so long as the parent takes the prescribed medication and follows the required regimen.¹⁸⁰ However, if a seizure does occur, the physical consequences are slight. The parent is incapacitated for a relatively short while—only during the time the seizure runs its course. After that, the parent is able to resume activities.¹⁸¹ Also, the epileptic parent's mate is aware of the partner's predisposition to seizure. Certainly, prior plans to deal with the situation would be made.

The most emotional, and thus perhaps the strongest, argument against permitting an adoption by an epileptic is not that the disorder physically prevents the parent from caring for the child; rather it is that the child will have an adverse reaction to the seizure and will be emotionally scarred by witnessing it.¹⁸² When faced with this issue, courts recognize the child may witness a seizure; yet, that fact alone is not sufficient to spirit the child away from its epileptic parent.¹⁸³ More than is generally realized, children have the capacity to cope with a variety of extraordinary situations.¹⁸⁴ Witnessing an epileptic seizure is not necessarily

179. The unemployment rate among epileptics is now six times higher than the national average. S. REP. NO. 94-29, 94th Cong., 1st Sess. (1975), in U.S. CODE CONG. & AD. NEWS (1975).

180. See text accompanying note 247 *infra*.

181. As one epileptic mother describes:

I simply black out for a few minutes, wake-up and then spend a few seconds getting my wits about me before resuming whatever I had been doing before.

O'Donovan, *supra* note 173, at 46.

182. Adoption of Martin, 76 Cal. App. 2d 133, 172 P.2d 552 (1946).

183. *Id.* at 137, 172 P.2d at 554.

184. See J. BOWLBY, II ATTACHMENT AND LOSS 5-6 (1973); A. Freud *Child Observation and Prediction Development—A Memorial Lecture in Honor of Ernst Kris*, 13 PSYCHOANALYTIC STUDY OF THE CHILD 953-54 (1958); Hellman, *Hempstead Nursery Follow-Up Study*, 17 PSYCHOANALYTIC STUDY OF THE CHILD 159-74 (1962); J. & J. Robertson, *Young Children in Brief Separation*, 26 PSYCHOANALYTIC STUDY OF THE CHILD 264-315 (1971); Note, *The Lesbian Mother*, 12 SAN DIEGO L. REV. 799 (1975).

traumatic to a child, especially if its parent has explained the manifestations of the disorder with candor and love. One adoptive¹⁸⁵ epileptic mother has written:

Many people ask how my girls have adapted to my disease. It is undeniable that it has affected them, but not always for the worse. At an early age my daughters learned to have compassion for the difficulties and differences of others.

. . . .

I am proud of my children's reaction to my epilepsy. Anne deals calmly with my seizures and will hold my hand or cushion my head during a blackout. Once I had a blackout while cooking breakfast, and she had the presence of mind to turn off the burner.¹⁸⁶

In addition the child would not be exposed to any extraordinary physical danger. For instance, epileptics present very little risk of harm to co-workers.¹⁸⁷ Moreover, children of school age spend many hours in school away from the parent. Also, a parent might well be warned of the seizure by an aura and take refuge. Most importantly, the majority of epileptics are totally controlled. For these people no reason exists to deprive them of the privilege of adopting.

The tragedy, of course, is that arbitrary placement of epileptics into a health risk category effectively minimizes their opportunity to adopt. The epileptic is denied what is available to other applicants—the right to be evaluated as a human being capable of loving

185. Pat O'Donovan tried for years to adopt a child from adoption agencies. Although she and her husband exhibited all the right qualifications, they were turned down by every agency. See note 173 *supra*. Eventually the O'Donovans adopted two children by private means with the help of an attorney. O'Donovan, *id.*

186. *Id.*

187. Recent studies have shown that epileptic workers, when placed in jobs that take their impairment into account, have an accident experience and performance record that compares favorably with that of unimpaired workers (U.S. Department of Labor, 1948; Udel, 1960; Lorbeer and Barron, 1958). In one such study the accident records of epileptic and unimpaired workers were compared, and it was found that the rate of nondisabling injuries of epileptic and unimpaired workers was 5.5 and 4.4 respectively. The difference in rates is not statistically significant. A comparison of disabling injuries indicated that the frequency rate for the epileptic worker was slightly higher than that for the unimpaired group. This difference, however, amounted to less than 1 injury per million exposure hours, and it did not appear statistically significant. Epileptic workers were found to be equally as reliable in work attendance as the unimpaired group (U.S. Department of Labor, 1948). Other studies have also shown that, under the methods by which workmen's compensation insurance premiums are calculated, it is highly unlikely that the cost of such coverage would be increased by hiring epileptic workers (Eilers and Melone, no date (b)). Finesilver, *Legal Aspects of Epilepsy*, in *EPILEPSY REHABILITATION* 60 (1975).

a child as one's own with compassion, acceptance, and understanding.¹⁸⁸ The presence of controlled epilepsy in an applicant holds little relation to the fundamental questions at issue in the adoption proceeding: Will this applicant provide an emotionally stable, economically secure home for a child? Has the prospective parent a capacity for parenthood? Certainly the mere existence of controlled epilepsy does not command a negative answer. Epilepsy does not adversely affect one's ability to love and care for a child. Moreover, emotional difficulties do not automatically follow a physical disorder.¹⁸⁹ In fact, if a person has had to cope with a disorder and has done so successfully without incurring emotional problems, this should be clear evidence of ability to deal effectively with adverse situations. It adds credence to the inference that this person is capable of raising an adoptive child.¹⁹⁰

When the question is not the fitness of a person to *adopt* a child, but rather fitness to *keep* a child, courts have not viewed epilepsy in the custodian as the crucial determinant.¹⁹¹ In a recent New

188. Epileptic people have an unrestricted right to a biological family. This right is secure, protected in large measure by our legal history, social mores, and to a certain extent constitutional safeguards. They can marry, procreate, and raise a family as they see fit, unencumbered by rules or laws different from those which govern the lives of others. See text accompanying note 94 *supra*. Furthermore, courts do not deprive epileptic parents of custody of their child solely because of seizure predisposition. See text accompanying note 191 *infra*. Yet, when faced with adoption proceedings the epileptics' chances of successfully adopting are slim.

189. Epilepsy is not a form of insanity. Some cases which recognize the fact that the epilepsies do not constitute a form of insanity include *People v. Hardy*, 33 Cal. 2d 52, 66, 198 P.2d 865, 873 (1948) (epilepsy is not an insanity defense); *In re Dach's Guardianship*, 272 Wis. 120, 74 N.W.2d 766 (1956) (the court refused to take judicial notice that epileptic people are hopeless). Although throughout history epileptics were categorized as feeble-minded or insane, medical fact has destroyed this myth. See text accompanying note 65 *supra*.

190. A noted authority on child welfare and placement agrees with this view.

The point overlooked is that many healthy people who wish to adopt a baby have lived through unhealthy experiences. The crux of the matter is not necessarily the unhealthy experience itself, but what the person has done with his life in spite of this experience: whether he now enjoys release from its traumatic effects or whether he is still chained by its power over him; whether the problem has evaporated or whether its infection is still a source of psychic irritation and suffering. D. HUTCHINSON, *CHERISH THE CHILD* 83 (1972).

191. Epileptic parents are rarely denied the custody of their biological

York case, a trial court refused to deprive the parents—both epileptics—of custody of their six-month old child.¹⁹² State welfare officials argued that the child would not be properly cared for.¹⁹³ Noting that no harm had befallen the mother's now teenage daughters from a previous marriage, the judge ruled against the State.¹⁹⁴ Similarly, custody was returned to an epileptic mother in an Iowa case even though her husband contended epilepsy prevented the woman from being able to adequately provide for the children.¹⁹⁵ The court rejected this contention, saying:

So far as the welfare of the children is concerned . . . there seems no reasonable ground for apprehension as to their safety or welfare while committed to her care and custody even though she should experience a recurrence of the . . . disorder [the epilepsies] from which she previously suffered.¹⁹⁶

Finally, in *Adoption of Martin*,¹⁹⁷ a California appellate court rejected the claim that a child would detrimentally suffer by observing its mother's seizures. The child's mother, after the untimely death of her husband, voluntarily relinquished her child for adoption by her parents, with whom she lived. The paternal grandparents contested the adoption arguing that "the young children of a woman who suffers occasional spells of epilepsy should not be permitted to live in the home with her if another entirely suitable home can be provided for them."¹⁹⁸ The appellate court disagreed. The advantages that would accrue to the child through being reared in the home of its maternal grandparents and in the society of her mother outweighed the disadvantages.¹⁹⁹

Existence of epilepsy in a prospective parent is not at odds with the agency requirement of good health. An epileptic whose seizures are controlled is in good health, and is not handicapped. Such a person is as capable of loving a child as one who is seizure free.

children. Courts recognize the epilepsies are a physical disorder, having little influence on the parent's capacity to successfully care for a child. In cases in which custody is denied, the decision turns on factors such as the custodian's inability to provide for the child's economic well-being or maintain an emotionally stable environment rather than on the existence of epilepsy alone. Further, if epilepsy is the only evidence "adverse" to the custodian's right to custody, this presence alone is insufficient to terminate the custodial right. See text accompanying note 200 *infra*.

192. Schultz, *Four Million Americans Should Not Have to Lie About Their Health*, TODAY'S HEALTH, Sept. 1975, at 16-17.

193. *Id.*

194. *Id.*

195. *Wood v. Wood*, 220 Iowa 441, 262 N.W. 773 (1935).

196. *Id.* at 443, 262 N.W. at 775.

197. 76 Cal. App. 2d 133, 172 P.2d 552 (1946).

198. *Id.* at 137, 172 P.2d at 554.

199. *Id.* at 136, 172 P.2d at 554.

This is not to say, however, an agency should overlook the presence of the epilepsies in a prospective parent. Such a view would be unreasonable. But the epileptic must be judged fairly.²⁰⁰ To this end, judicial response to evidence of the epilepsies should be followed by adoption agencies. The evidence should be a factor in consideration, but if it is the only evidence adverse to the prospective parents' eligibility, it ought not be sufficient to deprive them of the chance to adopt. The agency must consider the character of the seizures, the extent to which they are controlled, and the time since the last occurrence. The agency must not be blinded by the parent's physical disorder to such an extent that it does not seek to discover whether the parent would provide a warm, emotionally stable, and economically secure home for a child.

Summary: The Epileptic and the State-Decreed Family

To this point, analysis has focused upon the external impact epilepsy exerts on those who choose to have a biological family and on those who participate in an adoption proceeding or custody hearing. As has been shown, California law protects the epileptic adult's right of choosing to marry and to raise a child. Further, it appears the right of child custody is not jeopardized solely because the parent exhibits seizure predisposition. However, an epileptic adult's chances of acquiring a state-decreed family through the adoption process are slim. Unless adoption agencies follow an administrative procedure analogous to the judicial considerations applied in a custody hearing, an epileptic adult is effectively deprived of the adoption privilege. But although the epileptic adult experiences difficulty in adopting, the epileptic children up for adoption are not so unfortunate. Legislative and administrative actions to foster and encourage their adoption have enhanced adoption prospects considerably.

In the subsequent section the focus is different. Again, the subject is the epileptic who is taking medication for the seizure condi-

200. Social reaction to epileptic people remains one of distrust and fear predicated upon a stereotyped image of epilepsy which is inaccurate and misleading. The result is discrimination rooted in unnecessary prejudice. For a general discussion of the stigma of epilepsy, see *Hearings on H.R. 13405*, *supra* note 1, at 35-42 (statement of Paul E. Funk, Executive Vice President, Epilepsy Foundation of America).

tion and who has established an acceptable level of seizure control. But the arena of inquiry shifts to civil liability. The issue is the extent of duty an epileptic owes to others once the epileptic is aware of seizure predisposition.

Civil Liability

The Issue

Tort actions for negligence raise the issue of whether an individual has a civil duty to another. Judicial inquiry seeks to ascertain if a legal obligation exists to conform one's conduct to a standard of reasonable care.²⁰¹ This legal obligation is called duty. If the actor is found to be under a duty, inquiry then turns to whether the duty has been breached, and, if so, whether the breach is a proximate cause of the injured party's damages.²⁰²

Under common law, the necessary predicate for the existence of duty is foreseeability of harm to the person injured. If the actor's conduct can foreseeably cause injury to the victim, the foundational element for duty is established.²⁰³ The converse is true also. For example, when one drives an automobile,²⁰⁴ a duty of reasonable care to prevent an accident arises. But if the driver unforeseeably loses consciousness, the duty of reasonable care is not breached, for he cannot reasonably be expected to prevent that which he can not anticipate or control.²⁰⁵ "In such event the very foundation of neg-

201. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 53, at 324 (4th ed. 1971).

202. The elements of a cause of action for negligence are: duty, breach of duty, proximate cause, and damage. See *id.* at 143.

203. The foreseeable risk of harm to another is necessary to establish liability. *Id.* But, foreseeability is not the only criteria giving rise to a duty. Other considerations might include: (1) the administrative factor; (2) the ethical and moral factor; (3) the economic factor; (4) the prophylactic factor; and (5) the justice factor. For a discussion of these factors, and duty in negligence cases generally, see Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034 (1928) and Green, *The Duty Problem in Negligence Cases II*, 29 COLUM. L. REV. 255 (1929). For a critique of the Green view, see Bohlen, *Book Review*, 80 U. PA. L. REV. 781. The California Supreme Court recognizes foreseeability is not the only criterion in establishing the existence of duty. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

204. The discussion for the remainder of the article will focus upon the epileptic's duty when using an automobile. An automobile is generally considered a dangerous instrumentality when operated. Because of the automobile's nature, the duty of care in its use is high. It follows that the duty established in automobile cases and the standard of care to be met could be applicable in cases not involving dangerous instrumentalities. Certainly, in such cases the duty of care would not be higher, and, if circumstances warranted, it could be lower.

205. The leading case applying this rule is *Cohen v. Petty*, 65 F.2d 820

ligence—knowledge and hence foreseeability—is absent.”²⁰⁶ In legal as well as lay terms, the event is an “unavoidable accident.”²⁰⁷ Thus liability does not attach when control is suddenly and unforeseeably lost because the driver is overtaken by a sneeze,²⁰⁸ a heart attack,²⁰⁹ or a fainting spell.²¹⁰

This well-recognized rule, consistent with a theory of liability based on fault,²¹¹ affords a defense to those who without warning suffer sudden unconsciousness.²¹² However, such a defense is unavailable to epileptics who are aware of their seizure predisposition. Because of past seizures, future seizures are arguably foreseeable. Consequently, under one application of the foreseeability test, a few courts have held that awareness of a predisposition to epilepsy establishes liability when a seizure is a cause in fact of the injuries inflicted. As stated in *Malcolm v. Patrick*:²¹³

For anyone who knows himself to be epileptic ever to drive a car is . . . unforgivable.²¹⁴

Other examples of the *Malcolm* position exist. In *Eleason v. Western Casualty & Surety Co.*,²¹⁵ the Wisconsin Supreme Court, confronted with a statute prohibiting epileptics from driving, held it was negligence “as a matter of law” for an epileptic to drive a vehicle knowing he was subject to seizure. The Court of Appeals of New York in *People v. Eckert*²¹⁶ and *People v. Decina*²¹⁷ sustained

(D.C. Cir. 1933). The *Cohen* rule has been expressly adopted in California. *Ford v. Carew & English*, 89 Cal. App. 2d 199, 203, 200 P.2d 828, 830 (1948); *Waters v. Pacific Coast Dairy, Inc.*, 55 Cal. App. 2d 789, 792, 131 P.2d 588, 590 (1942).

206. *Bridges v. Speer*, 79 So. 2d 679, 681 (Fla. 1955).

207. See PROSSER, *supra* note 202, at 140.

208. *Zabunoff v. Walker*, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961).

209. *Ford v. Carew & English*, 89 Cal. App. 2d 199, 200 P.2d 828 (1948).

210. *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933).

211. For a discussion of fault, see PROSSER, *supra* note 202, at 16-19.

212. Typically, plaintiff has established a prima facie case. With the facts of the accident and the injuries having been shown, the plaintiff is entitled to a presumption of negligence. Unless the defendant can overturn the presumption with a showing of an unforeseeable, sudden loss of consciousness, liability is declared and damages assessed. *Malcolm v. Patrick*, 147 So. 2d 188, 192 (Fla. 1962); *accord*, *Ford v. Carew & English*, 89 Cal. App. 2d 199, 200 P.2d 828 (1948).

213. 147 So. 2d 188 (Fla. 1962).

214. *Id.* at 193.

215. 254 Wis. 1, 35 N.W.2d 300 (1948).

216. 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956).

217. 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).

manslaughter indictments on the sole basis of awareness of a seizure condition because driving an automobile with such knowledge went beyond negligence sufficient for civil liability: It constituted reckless or culpably negligent conduct.²¹⁸ And in *Golembe v. Blumberg*,²¹⁹ a father was held negligent for entrusting an automobile to his son—a known epileptic—when the son experienced a seizure while driving.

In each case, the court recognized awareness of the disorder's existence as equivalent to actual knowledge a seizure may recur. Awareness fulfilled the foreseeability criterion, giving rise to a duty of due care toward others. With this portion of the analysis there can be little objection. Surely, epileptics ought to be under a duty toward others when the potential for a seizure is present. A seizure recurring while an automobile is being driven clearly heightens the probability innocent parties may sustain injuries. Difficulty with these cases exists not in the recognition of what gives rise to the duty, but rather in the definition of what constitutes the duty once it has arisen.

These and other similar cases²²⁰ hold the duty of due care requires abstention from driving, so negligence and recklessness arise as soon as the epileptic begins to drive the automobile.²²¹ If a seizure results in an accident causing injuries to others, the essentials for a successful cause of action exist. Efforts made by the epileptic to prevent seizure recurrence are no defense. Because the announced duty is to abstain completely from driving, efforts to prevent seizure, even if proven, would appear to be wholly irrelevant.

218. The California rule is *contra*. See *People v. Spragney*, 24 Cal. App. 3d 333, 100 Cal. Rptr. 902 (1972); *People v. Freeman*, 61 Cal. App. 2d 110, 141 P.2d 435 (1943).

219. 262 App. Div. 759, 27 N.Y.S.2d 692 (1941).

220. The few cases dealing with the issue of prior awareness of predisposition to unconsciousness are collected at Annot., 28 A.L.R.2d 12 (1953).

221. The court in *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956), held steadfastly to this point. The court reasoned that because the driver was aware he was subject to seizure *at any time*, his act was done in conscious disregard of others and therefore criminally punishable. As Judge Desmond's dissent clearly points out:

Just what is the court holding here? Not less than this: that a driver whose brief blackout lets his car run amuck and kill another has killed that other by reckless driving. But any such recklessness consists necessarily not of the erratic behavior of the automobile while its driver is unconscious, but of his driving at all. . . . Thus, it must be that such a blackout prone driver is guilty of reckless driving . . . , whenever and as soon as he steps into the driver's seat of the vehicle. Every time he drives, accident or no accident, he is subject to criminal prosecution for reckless driving . . . *Id.* at 147-48, 138 N.E.2d at 809, 157 N.Y.S.2d at 572 (Desmond, J., dissenting).

The rule's strictness probably turns on the fact that although the epileptic defendant in each case had a seizure within a relatively short period prior to the accident, he continued to drive.²²² Because foreseeability of recurrence was heightened by the immediately previous seizure, the courts established the duty as abstention from driving, thus abolishing any defense predicated on the epileptic's efforts to prevent seizures. But the courts have not been definitive on whether awareness sufficient to give rise to foreseeability was limited to awareness of the immediately previous seizure or awareness of the existence of the disorder itself. In the former situation, little objection exists to the result in each case. In the latter, strenuous objection can be interposed. Because many epileptics presently drive under state sanction,²²³ a judicial rule assessing liability simply because a person is known to have epilepsy undermines recent legislative successes in licensing epileptics. Furthermore, the rule is blind to the status of medical advancements and medical capabilities.

Surely, judicial rules should not exist in isolation. The medical profession took the first steps to reduce the unnecessary discriminations of the past, causing legislatures to re-evaluate the laws affecting epileptics. Although slowly, society has begun to correct its mistaken view of the epileptic. This progressive movement toward recognizing epileptics as more than second class citizens has the effect of placing the judiciary at a crossroads. The judiciary can choose to stifle progress by adhering to the strict rule enunciated above, or it can choose to recognize progress by adopting a more flexible rule of civil duty which focuses upon the actual foreseeability of seizure recurrence.

222. In *Malcolm v. Patrick*, 147 So. 2d 188, 191 (Fla. 1962), the defendant admitted having dizzy spells prior to the accident.

In *Golembe v. Blumberg*, 262 App. Div. 759, 27 N.Y.S.2d 692 (1941), the father did not contest the fact he knew the child had seizure predisposition.

In *People v. Eckert*, 2 N.Y.2d 126, 132, 138 N.E.2d 794, 798, 157 N.Y.S.2d 551, 557 (1956), the defendant admitted a history of minor seizure episodes. From the history, it is inferable that seizures had occurred a relatively short time before the accident.

However, in *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956), there is no indication whether the defendant had had a seizure just prior to the accident. The court assumed the truth of the indictment which said that defendant knew he was subject to seizure at any time. It is this point that triggered Judge Desmond's dissent; see note 221 *supra*.

223. See text accompanying note 224 *infra*.

Criticism of the Strict Rule

All state laws now provide some mechanism whereby the epileptic is extended the driving privilege upon a showing of capability to operate a motor vehicle with reasonable safety.²²⁴ Epileptics who have obtained significant seizure control for a reasonable period are objectively evaluated.²²⁵ Normally, the required seizure-free period is two years, although some states have lowered the requirement to one year.²²⁶ Once proof of the seizure-free period has been established, the license is issued.²²⁷

This licensing procedure was adopted because motor vehicle administrators recognized that a procedure which encouraged epileptics to disclose their condition and submit to a fair evaluation of driving ability was best calculated to reduce highway risks.²²⁸ Past experience proved legislative prohibition of the epileptic's driving privilege drove them underground.²²⁹ Epileptics drove despite the risk of civil liability or criminal penalty because economic and social consequences from not driving were simply too costly.²³⁰ Epileptics

224. BARROW 58.

225. In California the licensing system for epileptics is as follows: When the applicant is known to be epileptic, the Department of Motor Vehicles (DMV) is under legislative mandate either to refuse issuance of the license or to revoke the license once issued. CAL. VEHICLE CODE, § 12805 (West Supp. 1975) and CAL. VEHICLE CODE § 13359 (West 1971). After the license has been initially denied, the DMV conducts an investigation to determine whether the driving privilege should be denied or issued under probationary conditions. CAL. VEHICLE CODE, § 13800 (West Supp. 1975). Before the license may be refused, however, a hearing must be conducted. CAL. VEHICLE CODE, §§ 13950, 13951, 13953 (West 1971). The applicant is given notice of the hearing. If the applicant fails to respond, the hearing is waived. CAL. VEHICLE CODE, § 14103 (West 1971). The applicant can demand either a formal hearing or an informal hearing. CAL. VEHICLE CODE, § 14100 (West 1971). A formal hearing is not permitted when the applicant's objection to DMV action is based upon the results of a law test or driving test. CAL. VEHICLE CODE, § 14102 (West 1971). A formal hearing may be demanded, however, when the DMV action is based on the medical or physical disability of the applicant. The hearings, findings and recommendations are submitted to the DMV Director, or to an employee at the level of Asst. Division Chief who makes the final decision on issuance of the license. CAL. VEHICLE CODE, § 14112 (West 1971).

226. BARROW 62 and 75-76. The American Medical Association recommends a seizure-free period of two years before a license is issued. *Id.* at 63. Some states require a seizure-free period of one year. *Id.* at 73. Barrow indicates that the experience of the states requiring only a one year seizure-free period is as good as those states that require a longer period. *Id.* at 73-74.

227. See note 225 *supra*.

228. BARROW 58.

229. *Id.* 60-61.

230. The epileptic presently faces grave obstacles in obtaining a job and earning a living. The current unemployment rate among epileptics is six

either drove without a license or falsified the license application by not disclosing the disorder.²³¹

The new licensing programs have been successful. Because epileptics know a license will not be arbitrarily denied, fewer epileptics go underground.²³² Most accept the physical constraints of the disorder and comprehend the necessity for regulation and supervision where the possible effect of a seizure may cause injury. As indicated by Barrow and Fabing:

The value of adopting a fair, objective procedure is in reducing greatly the proportion who conceal the condition and make an independent decision [to drive].²³³

Moreover, the category of people included within medical probationary programs has been expanded. Whereas statutes had previously restricted the category to epileptics, others subject to loss of consciousness, such as the diabetic and the heart patient, now fall within its purview.²³⁴ These achievements not only benefit the public, but also help facilitate rehabilitation of the epileptic, equal-

times higher than the national average. See note 179, *supra*. Denial of the driving privilege makes getting a job that much more difficult. The epileptic is deprived of work requiring occasional use of an automobile or of jobs located where the automobile is the only feasible means of transportation. BARROW 59.

231. BARROW 61. In those states such as California, which obligate physicians to notify state officials of persons with seizure conditions, the result would be little different. The marginal epileptic would drive surreptitiously even though the physician and the state are aware of the disorder's existence, or the epileptic fails to inform the physician in the first place. *Id.* 82.

In fact, some epileptics, to thwart compulsory disclosure, leave the state to obtain treatment then return to drive within the state. *Id.* 83 n.50.

Whether or not a state statute that compels a physician to notify state officials of all persons subject to lapses of unconsciousness serves to increase traffic safety is open to question. Barrow and Fabing indicate it may not. *Id.* For other objections to the physicians reporting statute, see BARROW 77-83.

232. *Id.* at 62.

233. *Id.*

234. Until 1974 CAL. VEHICLE CODE § 12805(c) (West 1971) applied only to epileptics. In 1974 the statute was amended to include persons who have a disorder characterized by lapses of unconsciousness. CAL. VEHICLE CODE, § 12805(c) (West Supp. 1975).

This change is consistent with the findings of Dr. Julian A. Waller. In a report presented at the annual meeting of the American Association of Automotive Medicine on October 27, 1964, Dr. Waller concluded "that the present emphasis on epilepsy as the major medical handicap to safe driving

ize the administration of the laws, and reduce the stigma of epilepsy.

The current judicial rule basing liability solely on the actor's knowledge of the disorder's existence runs counter to these legislative and administrative efforts. Such a rule ignores the medical advancements which stimulated legislative action granting epileptics driver's licenses. Furthermore, it reinforces the stigma of epilepsy by undermining efforts to encourage disclosure of the disorder, maintenance of a medical and physical regimen, and cooperation with the state. Additionally, because meeting state legal and medical requirements is no defense, the incentive to comply with state regulation is removed. The situation is akin to the infamous Catch 22;²³⁵ if an epileptic who is aware of seizure predisposition does not meet any standards, liability attaches to an accident precipitated by a seizure; if the same epileptic meets state legislative, administrative, and medical standards, liability attaches nevertheless.

The automobile is an essential, if not indispensable, part of our way of life. Some would argue that driving is a conditional right rather than a privilege.²³⁶ Nevertheless, the state's interest in traf-

is too narrow an approach." Waller, *Chronic Medical Conditions and Traffic Accidents* 13 (1964) (on file in the office of the *San Diego Law Review*).

Doctors had been under an obligation since 1966 to report all people with conditions characterized by unconsciousness to the Department of Health, which in turn notified the Department of Motor Vehicles. This includes diabetics and heart patients. CAL. HEALTH & SAFETY CODE § 410 (West 1970); 17 CAL. ADM. CODE § 2572 (1966). Prior to 1966 the statute pertained to epileptics only. Cal. Stats., ch. 205, p. 850, § 9 (1951). But, notwithstanding the new reporting statute, the statute automatically denying a license because of some physical disorder remained restricted to epileptics until 1974. In that year the statute was amended to include all people subject to lapses of unconsciousness. CAL. VEHICLE CODE § 12805 (West Supp. 1975). For eight years the epileptic was treated differently from the diabetic and the heart patient; yet, each were subject to the same symptom that made them safety risks—loss of consciousness. Discrimination dies slowly.

235. J. HELLER, CATCH 22 (1955).

236. BARROW 59. Other authors note the existence of the view that driving is a conditional right. See Pricer and Wyckoff, *Practices and Procedures of the Department of Motor Vehicles*, 14 HASTINGS L.J. 355 (1963).

Nevertheless, most states regard driving on the public highways as a privilege, rather than a right, and thus place on the applicant the burden of proving his ability to drive safely. California holds this view. See *id.* at 357. But, the New Jersey statute is contra. It provides that a driver's license may not be denied on the basis of a defect and places on the Director of the Division of Motor Vehicles the burden of showing that the defect renders the applicant incapable of driving safely. N.J. STAT. ANN. § 39-3-10 (1973).

It is within the states' police power to regulate the issuance of licenses,

fic safety must be balanced against the individual's interest in the automobile's use.²³⁷ A judicial ban on the driving privilege precludes any workable balance. It engenders the same response as did the arbitrary ban previously adopted by the legislature. The epileptic would again go underground. Consequently, the number of marginal epileptic drivers would be greater, and the risks to other motorists would be increased. Moreover, policing of marginal epileptic drivers would be difficult. In all likelihood, their very existence could not come to light until an accident occurred.

The Flexible Rule and How it Works

However, an alternative rule to civil liability is consistent with both the traffic safety rationale and the recent actions by state officials. Essentially, the alternative or flexible rule is predicated on a duty of seizure prevention when an epileptic attains the requisite seizure control to be granted a license. Besides licensing, two other elements comprise the standard of care—maintaining a medical and physical regimen and cooperating with the attending physician. The legal, as well as medical, effect of meeting the standard of care is to reduce the foreseeability of seizure recurrence.

The flexible rule differs from its strict counterpart in that inquiry must go beyond mere discovery of epilepsy in the driver. It must seek to determine actual foreseeability of the specific seizure which could precipitate an accident. Observance of the rule would be a defense in an action for damages when injury results from a seizure. For instance, if the epileptic is licensed, has been seizure-free for two years, has maintained a medical and physical regimen, and informs the doctor of any change in condition, a sudden seizure while driving is virtually unforeseeable, notwithstanding the driver's knowledge of epilepsy. The epileptic has done all that could be done to prevent seizure. No inkling, premonition, or anticipation

People v. O'Neil, 62 Cal. 2d 748, 753-54, 401 P.2d 928, 931, 44 Cal. Rptr. 320, 323 (1965); Annot., 17 A.L.R.3d 806 (1968). Furthermore, the DMV's right to not issue or to revoke licenses is constitutional. The Motor Vehicle Act does not constitute an unlawful delegation of legislative power to the DMV, for the statute provides a complete and comprehensive guide to departmental action. *Beaman v. Department of Motor Vehicles*, 180 Cal. App. 2d 200, 4 Cal. Rptr. 396 (1960). The revocation or non-issuance of a license is not a penal action. Its purpose is to make the streets and highways safe by protecting the public from incompetence, lack of care, and wilful disregard for the rights of others. *Id.* at 210, 4 Cal. Rptr. at 403.

237. BARROW 123.

of seizure is present. Except for awareness of controlled seizure predisposition, such a case is hardly distinguishable from a classic case of sudden unconsciousness.²³⁸

Of course, if the licensed epileptic fails to maintain his medical regimen, or has a seizure while not driving and does not disclose the fact, or fails to meet the standard of care in some other way, the prospect of seizure recurrence while driving is heightened. The burden is on the epileptic to persuade the trier of fact that the standard of care has been met and that the seizure was unforeseeable.²³⁹ The duty of due care is placed firmly on the epileptic. But under the flexible rule, the duty, although stringent, is not oppressive and unworkable. It preserves traffic safety while providing a reasonable defense to those with controlled seizure predisposition.

The argument against the flexible rule is that as between the innocent victim and the epileptic driver whose unexpected seizure was the cause of the injuries, the epileptic is less innocent, thus more "responsible." Certainly, had it not been for the seizure, the injuries might not have been inflicted. But the determination of responsibility in a system of liability based on fault does not turn on resolution of the question of cause in fact. Understandably, one recoils at the thought that the injured party must bear the loss. Nevertheless, in balancing between the person injured and the person who without fault was the instrument of injury, courts universally hold for the latter.²⁴⁰ The tort system does not accommodate redress to all people injured by another: It accommodates only those toward whom a duty has been breached.²⁴¹

Whenever presented, this redress of damages argument is not directed at the issue of what constitutes the duty in a given case. That plaintiff has been injured and seeks compensation raises the question of liability; it does not begin to answer it. Essentially this argument goes to the propriety of the tort system itself. But whether another system of compensation ought to be adopted is not the subject of this Note.²⁴² The issue is and remains the extent

238. See text accompanying note 205 *supra*.

239. See note 212 *supra*.

240. See text accompanying note 205 *supra*.

241. See text accompanying notes 202-10 *supra*.

242. For a discussion of alternative systems of compensation for injuries sustained in auto accidents, see R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM; A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); *A Symposium on No-Fault Automobile Insurance—Perspectives on the Problems and Plans*, 21 CATH. L. REV. 259 (1972); *Symposium on No-Fault*, 71 COLUM. L. REV. 189 (1971); *Symposium on No-Fault*, 44 MISS. L.J. 1 (1973).

of the epileptic's duty. As suggested earlier, the duty should consist of licensing, maintenance of a medical and physical regimen, and cooperation with the physician. A discussion of each of these elements follows.

The Standard of Care

Licensing

Unquestionably, the licensing procedure does not in itself protect the injured party from harm. The case law is replete with decisions holding the existence or non-existence of a license to drive is not determinative.²⁴³ The issue is the character of defendant's conduct toward the plaintiff.²⁴⁴ This is true for the epileptic. Having the license is not a fail-safe to accident occurrence. The epileptic might still be liable for injuries resulting from a seizure even though a license is possessed.²⁴⁵

The licensing procedure is advocated, nevertheless, because it increases greatly traffic safety.²⁴⁶ The effect of licensing is not to absolve the epileptic of duties owed toward others; instead it indicates seizure recurrence is less foreseeable. Consequently, if a seizure recurs after a license has been issued, inquiry should focus upon the actual foreseeability of the seizure which precipitated the accident and not end because the person is discovered to be epileptic.

Medical and Physical Regimen

Prevention of seizure recurrence requires that anti-convulsant drugs be taken routinely and conscientiously. These drugs neutral-

243. For a compilation of the cases on this point, see Annot., 163 A.L.R. 1375 (1946).

244. A causal connection must exist between the absence of a license and the injury inflicted. *Armenta v. Churchill*, 42 Cal. 2d 448, 458, 267 P.2d 303, 309 (1954).

245. The majority of cases holding a driver liable for awareness of a predisposition to lose consciousness is based on facts indicating the driver lost consciousness just previously to the accident but nevertheless continued to drive. See text accompanying note 222 *supra*. See also *Soule v. Grimshaw*, 266 Mich. 117, 253 N.W. 237 (1934); *State v. Gooze*, 14 N.J. 277, 81 A.2d 811 (1951) (Super. Ct. App. Div.). If the epileptic had a seizure while not driving and decided to drive shortly thereafter, he would fall within the purview of this rule. He would also be liable under the flexible rule because he failed to adhere to the standard of care. See text accompanying note 238 *supra*.

246. See text accompanying note 228 *supra*.

ize the affected area of the brain so that uneven electrical discharges will not revert to full-fledged seizures.²⁴⁷ For anti-convulsants to work, the level of medication in the body must remain constant. Failure to take medication one day—or the taking of a double dose to make up for the previous day's failure—causes the level of medication in the bloodstream to jump considerably. Unsteadiness in the medication level can trigger some seizures, and at the least increase the probability of seizure recurrence.²⁴⁸ The epileptic must take the medication as instructed, as well as make no attempt to limit or eliminate drug therapy without the approval of his or her physician. Disregard in this respect is irresponsible.

The epileptic must also follow a physical regimen. As with the kind and level of drug prescription, the exact type of such a regimen must be determined by consultation with a physician. Each person is different and requires individual treatment. At the least, however, epileptics should refrain from alcoholic beverages, keep regular hours, get adequate sleep, and eat proper foods.²⁴⁹ Alcohol, by neutralizing or distorting the chemistry of anti-convulsants, can precipitate seizures.²⁵⁰ Inadequate sleep and diet control increase seizure predisposition by lowering resistance.²⁵¹

Cooperation with the Doctor

Finally, epileptics must be honest with themselves and their doctors. Their safety and the safety of others depend on this. Having been initially attained through diagnosis by the doctor and treatment with anti-convulsants, seizure control can best be sustained by constant vigilance. Frequent visits coupled with electroencephalograph monitoring of brain wave activity permit the doctor to adjust drug therapy as needed and reduce the possibility of seizure onset. However, failure by the epileptic to report any changes in seizure activity increases the foreseeability of seizure onset.

Summary: Civil Liability

The defense of sudden unconsciousness is universally available when the person rendered unconscious has no reason to anticipate its onset. In a system of liability based on fault, the balance is

247. EPILEPSY SOCIETY OF SAN DIEGO, AN EPILEPSY MEDICATION HANDBOOK 1 (1975).

248. *Id.*

249. *Id.* at 2.

250. *Id.*

251. BARROW 22.

struck in favor of the unforeseeably unconscious actor because no duty toward the injured party is breached. When, however, the actor is aware of seizure predisposition, a duty towards others clearly exists. The standard of care to be met in such a situation is one of two kinds. Courts can establish the duty of care strictly as abstention from driving. Under such a rule epileptics are exposed to civil liability each time they drive because they once were subject to seizure. There is no defense to the action because the breach of duty occurred when the epileptic drove. The alternative is to establish the standard of care as one of seizure prevention and to allow the epileptic to be licensed to drive. Under this rule, seizure onset is unforeseeable unless the epileptic defendant breached the duty to maintain a medical and physical regimen and to cooperate with the attending physician. In fact situations in which the epileptic has not had a seizure for an extended period and seizure suddenly recurs rendering the epileptic unconscious while driving, the defense is available. Because the flexible rule is consistent with recent legislative and administrative actions, is founded in a theory of liability based on fault, increases traffic safety, and reflects medical fact, it should be adopted as the general judicial rule.

CONCLUSION

The publication of *Epilepsy and the Law* caused legislatures to amend many laws affecting the lives of epileptics. Nationwide, the greatest changes occurred in laws pertaining to marriage, sterilization, and driver licensing.²⁵² Interestingly enough, California had no need to amend its laws in these areas. The epileptic never had been denied the right to marry or to raise a family.²⁵³ Similarly, the driving privilege had been extended whenever the epileptic demonstrated the capability of being a safe driver.²⁵⁴ As suggested earlier, however, access to these rights and privileges gave rise to logical and reasonable corollaries.

The logical corollary of the right to choose a biological family is a state-decreed family for those children and adults who do not

252. BARROW 30-56 and 57-89.

253. See text accompanying note 94 *supra*.

254. California had a procedure for licensing epileptics before publication of *Epilepsy and the Law*. BARROW 57 & n.1.

have biological families. As to this corollary, California responded affirmatively with respect to epileptic children available for adoption. Significant efforts are now being made in seeking homes for such children. For the epileptic adult, however, the privilege to adopt appears severely limited, if it exists at all.

A logical corollary to the driving privilege is a civil duty consistent with the privilege to drive; that is, a rule focusing inquiry in a civil action upon the actual foreseeability of the seizure precipitating the accident. California case law is meager on the point. In vehicular manslaughter cases, the actual foreseeability test is used.²⁵⁵ As has been advocated, the rule should be adopted in civil cases as well.

Medical advancements in diagnosis and treatment of the epilepsies have changed the epileptic's life dramatically. Approximately twenty years ago, society began to understand the effect of these advancements. Thereafter, some changes in anachronistic laws occurred almost immediately. But, although initial changes occurred, the epileptic, nevertheless, is unnecessarily set apart. If the epileptic ever is to exercise the rights and privileges of full citizenship, the adjustment of social response to medical fact must continue.

GERARD SMOLIN, JR.

255. *People v. Freeman*, 61 Cal. App. 2d 110, 141 P.2d 435 (1943). See also *People v. Spragney*, 24 Cal. App. 3d 333, 100 Cal. Rptr. 902 (1972).